79-1548

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. .....

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, MRS. CARNELL RUSS, VERNA RUSS, ROOSEVELT RUSS, ANGELA RUSS, CURTIS RUSS, SYLVIA RUSS, ANTHONY RUSS, PATRICIA RUSS, minors, by their mother and next friend Mrs. Carnell Russ,

Petitioners,

—vs—

BENJAMIN R. CIVILETTI, Attorney General of the United States, WILLIAM WEBSTER, Director of the Federal Bureau of Investigation, JOHN T. KELLY, Special Agent in Charge, Little Rock, Arkansas, Raymond Faist, formerly Special Agent in Charge, Little Rock, Arkansas, and others (unknown),

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. .....

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,

Petitioners,

vs.

BENJAMIN R. CIVILETTI, *etc.*, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Petitioners herein, the National Association for the Advancement of Colored People, Mrs. Carnell Russ (widow of the late Carnell Russ), and her several minor children, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on September 26, 1979 (Petition for Rehearing/ Rehearing *en banc* denied January 4, 1980).

Opinions Below

On September 3, 1976, the United States District Court for the District of Columbia, the Honorable Barrington D. Parker presiding, issued a Memorandum and Decision denying the Respondents' Motion to Dismiss and to Change

Venue. Said Memorandum Opinion is reported at 418 F. Supp. 1109 (D.D.C. 1976) and is set forth as Appendix A herein. A Supplemental Memorandum Order was issued by the District Court on August 16, 1977. It is reported at 76 F.R.D. 134 (D.D.C. 1977) and is set forth herein as Appendix B. On March 31, 1978, the District Court issued another Memorandum (discussing the matter of the award of attorneys' fees, the focus of concern herein). It is reported at 448 F. Supp. 1164 (D.D.C. 1978) and is set forth as Appendix C herein. A related Order was entered on April 3, 1978. It is unreported and is set forth as Appendix D herein. On September 26, 1979 the United States Court of Appeals for the District of Columbia Circuit issued a divided opinion (Wright, C.J., dissenting) reversing the award of attorneys' fees previously granted by the District Court to the Petitioners over and against the Respondents. It is reported at 609 F.2d 514 (D.C. Cir. 1979) and is set forth as Appendix E herein. A Petition for Rehearing/Rehearing *en banc* was denied on January 4, 1980. The orders in this respect are unreported and are set forth as Appendices I and J herein.

Jurisdiction

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on September 26, 1979. Thereafter, the Petitioners sought a rehearing/rehearing *en banc* which was denied by orders entered on January 4, 1980. Jurisdiction of this Court is invoked within ninety (90) days of the foregoing entry pursuant to 28 U.S.C. Section 1254 (1).

Question Presented

Whether a prevailing civil rights litigant is entitled to an award of attorneys' fees, over and against the United States and employees thereof (in their official capacities), pursuant to the Civil Rights Attorneys' Fees Awards Act of 1976, Public Law 94-559 (42 U.S.C. Section 1988).

Statutory Provisions

This matter involves the Civil Rights Attorneys' Fees Awards Act of 1976, Public Law 94-559 (42 U.S.C. Section 1988).

Statement of the Case

The narrowly defined issue raised before this Court has its genesis in an action which was filed in the United States District Court for the District of Columbia against the Attorney General of the United States and the Director of the Federal Bureau of Investigation and employees of that agency and in which the Petitioners, the National Association for the Advancement of Colored People, Mrs. Carnell Russ (widow of the late Carnell Russ), and her several minor children, challenged the failure of the federal government to undertake an effective investigation and to seek a federal criminal/civil rights prosecution of one Charles Lee Ratliff (then a former police officer for the City of Star City, Arkansas) for the shooting death of Carnell Russ in 1971, pursuant to 18 U.S.C. Section 242.[1]

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[1] Carnell Russ, a twenty four year old Black American citizen, was shot to death by a Star City, Arkansas policeman, Charles Lee Ratliff, following Russ' arrest for speeding on Memorial Day afternoon, May 31, 1971. In a related federal action filed in the United States District Court for the Eastern District of Arkansas, Russ' widow and children sought to recover damages for the alleged

The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. Section 1343(4) in conjunction with, among others, the Fifth, Thirteenth and Fourteenth Amendments to the United States Constitution and the Civil Rights Acts of 1866 and 1871 (42 U.S.C. Sections 1981 and 1985).

After the shooting death and as a consequence of national exposure and a substantial local media outcry (which resulted in, among other things, a investigation by the office of then Governor Dale Bumpers), a Lincoln County, Arkansas grand jury indicted the police officer for the less aggravated charge of voluntary manslaughter. The officer was eventually acquitted of the charges in a state court

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violation of Russ' constitutional and civil rights pursuant to the Civil Rights Act of 1871 (42 U.S.C. Section 1983) and, relying upon pendent jurisdiction, the Arkansas Wrongful Death Act, Arkansas Statutes Annotated Sections 27-906 *et seq.*

After a trial, an all white jury of twelve persons found no liability. After the trial court refused to direct a verdict or otherwise set the verdict aside, the United States Court of Appeals held that, if the Civil Rights Act was to have any meaning, the jury verdict exonerating Charles Lee Ratliff could not remain, as a matter of law, in view of the aggravated circumstances of the case and the total lack of justification for Ratliff to use his gun and to otherwise shoot the deceased between the eyes. See: *Russ* v. *Ratliff*, 538 F.2d 799 (8th Cir. 1976), *cert. denied* 429 U.S. 1041, 97 S.Ct. 740, 50 L.Ed. 2d 753 (1977). This Court previously denied review based on the Petition of the widow and minor children addressing the issue of the doctrine of respondeat superior (the responsibility of the City of Star City, Arkansas for the wrongdoing of its employee in and during the course of his duties for the City) and other related matters. See also: *Russ* v. *Ratliff*, 578 F.2d 221 (8th Cir. 1978), *cert. denied* 439 U.S. 1003, 99 S.Ct. 614, 58 L.Ed.2d 579 (1978).

Upon remand back to the trial Court, a judgment in the amount of approximately $288,000.00 plus fees and costs (in the amount of $60,000.00) was secured from the then absent police officer for the wrongful, illegal and unconstitutional death. Significantly, the fees were awarded under the Civil Rights Attorneys' Fees Awards Act of 1976 (the Act focused upon herein). After searching for and locating the absent police officer (in Tupelo, Mississippi), a deposition was secured reflecting the absence of any assets whatsoever, thereby making the substantial judgment more a fiction then a reality and collection thereon virtually impossible.

by an all white jury which deliberated less than fifteen minutes. After reviewing the transcript of the manslaughter trial proceedings and the Federal Bureau of Investigation (FBI) reports, the Department of Justice elected not to prosecute anyone under the federal criminal/civil rights statute, 18 U.S.C. Section 242 (notwithstanding that, prior to the commencement of the state criminal proceeding, the United States Attorney for the Eastern District of Arkansas indicated a belief that a federal civil rights/criminal violation existed thereby justifying federal prosecutorial effort).

In essence, the Petitioners claimed, through their effort in this litigation, "that the Justice Department illegally deferred to state proceedings, thereby pursuing a policy, established in 1959 by Attorney General William Rogers, not to follow a state prosecution with a federal trial for the same act, absent compelling reasons"; and that, as applied to civil rights cases generally and specifically to the instant case, the policy was unreasonable and racially discriminatory. See: March 31, 1978 District Court Memorandum, Appendix C herein.

After withstanding a motion to dismiss and an application for change of venue, *N.A.A.C.P.* v. *Levi,* 418 F. Supp. 1109 (D.D.C. 1976) (See: Memorandum Opinion, Appendix A herein), discovery was undertaken and the initially filed Complaint was amended twice (to clarify the claims as described).

Ultimately, on July 12, 1977 the parties filed a joint Motion to Dismiss in which it was agreed that:

> "1. The primary objective of the plaintiffs in this cause of action is to ensure that the United States Department of Justice does not fail to vindicate federally protected interests, by prosecuting local law enforcement officers alleged to have violated federal criminal

civil rights statutes, simply because state or local authorities have already prosecuted the same officers for state or local offenses arising from the same conduct.

2. Newly-appointed Attorney General Griffin B. Bell has recently issued a memorandum * * *. This memorandum essentially states that, regardless of prior state prosecutions for the same offenses, federal prosecution is to be instituted whenever necessary to vindicate federally protected interests.

3. The recent memorandum of Attorney General Bell indicates that the policy of the Department of Justice is in accord with the objectives of the plaintiffs in this lawsuit.

4. The plaintiffs and the defendants believe, therefore, that no useful purpose would be achieved by the continued litigation of this lawsuit." (Joint Appendix at page 284).

On August 16, 1977, the District Court issued a supplementary Memorandum Order (Appendix B herein) in which it held that, because of the recently announced policy of then Attorney General Bell which modified the 1959 non dual prosecution policy in the civil rights field and which was encompassed within a document attached to the joint Motion to Dismiss, the primary objective of the litigation, which was to ensure that the United States Department of Justice did not fail to vindicate a federally protected interest by not prosecuting local law enforcement officers alleged to have violated federal criminal civil rights statutes simply because state of local authorities had already prosecuted those officers for state or local offenses arising out of the same conduct, had been achieved. Accordingly, the cause was dismissed without prejudice to the Petitioners to reinstitute the law suit should the Respondents

fail in their stated obligations and without prejudice to the Petitioners to seek fees from the Court as a prevailing party. See: *N.A.A.C.P.* v. *Bell*, 76 F.R.D. 134 (D.D.C. 1977).

Ultimately, the Petitioners did seek fees; and, on March 31, 1978, the District Court issued a Memorandum finding that the Petitioners were, in fact and law, prevailing parties and awarding to them the sum of $26,912.25 as fees and costs (Appendix C herein) under the Civil Rights Attorneys' Fees Award Act of 1976 (42 U.S.C. Section 1988). See: *N.A.A.C.P.* v. *Bell*, 448 F. Supp. 1164 (D.D.C. 1978). An Order in like regard was entered on April 3, 1978 (Appendix D herein).

Thereafter, the Respondents filed a timely Notice of Appeal from the Memorandum and Order as described; and the parties agreed to a stay of execution pending the outcome of said appeal.

On appeal the instant matter was consolidated with the case of *Andrulis* v. *United States* (No. 78-2039) which raised a like issue regarding the propriety of the awarding of attorneys' fees, under the Civil Rights Attorneys' Fees Awards Act of 1976 (42 U.S.C. Section 1988), against the United States and employees thereof.

The consolidated matter was argued before the United States Court of Appeals for the District of Columbia Circuit on April 23, 1980. On September 26, 1979 the Court issued a decision, See: *N.A.A.C.P.* v. *Civiletti*, 609 F.2d 514 (D.C. Cir. 1979) (consolidated with *Andrulis* v. *United States*), reversing the District Court Orders in the respective matters insofar as they awarded attorneys' fees over and against the United States (under the Civil Rights Attorneys' Fees Awards Act of 1976—42 U.S.C. Section 1988). Senior District Judge Earl R. Larson, sitting by designa-

tion from the United States District Court for the District of Minnesota (pursuant to 28 U.S.C. Section 292(d)), wrote the majority opinion in which Circuit Judge M. Richard Wilkey joined. Chief Circuit Judge J. Skelly Wright dissented (with opinion).

The Petitioners sought a rehearing/rehearing *en banc;* but the Petition to the Circuit Court below was denied on January 4, 1980 (with Chief Judge Wright voting to grant the Petition for Rehearing, with Circuit Judge Robinson not participating in the consideration of the *en banc* Petition, and with Circuit Judge Wald joining with Chief Judge Wright in voting to grant the Petition for Rehearing *en banc*).

Reasons for Granting the Writ

1. The decision of the panel majority in the Circuit Court below conflicts with the "broad reach" accorded the Civil Rights Attorneys' Fees Awards Act of 1976 (42 U.S.C. Section 1988) by this Court in *Hutto* v. *Finney,* 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed. 2d 522 (1978).

In holding that the language of the statute was sufficient to overcome the states' Eleventh Amendment immunity, this Court said:

> "The Act itself could not be broader. It applies to 'any' action brought to enforce certain civil rights laws. It contains no hint of an exception for States defending injunction actions . . ."

Id. at page 694. In like respect "the language of the Act is also broad enough to apply to actions against the federal government." *N.A.A.C.P.* v. *Civiletti, supra* at 609 F.2d 523 (Wright, C.J., dissenting); for, without a specific exemption applying to it *in the Act itself,* there is no basis

for denying a prevailing litigant an award of attorneys' fees over and against the United States.

While ". . . all words of a statute are to be taken into account and given effect if that can be done consistently with the plainly disclosed legislative intent", *McDonald* v. *Thompson,* 305 U.S. 263, 266, 59 S.Ct. 176, 178, 83 L.Ed. 1264 (1938), citing *Ginsberg & Sons* v. *Popkin,* 285 U.S. 204, 208, 52 S.Ct. 322, 76 L.Ed. 704 (1932); *Ex parte Public Bank,* 278 U.S. 101, 104, 49 S.Ct. 43, 44, 73 L.Ed. 202 (1928). See also: *Wilderness Society* v. *Morton,* 479 F.2d 842, 856-857 (D.C. Cir. 1973), *cert. denied* 411 U.S. 917, 93 S.Ct. 1550, 36 L.Ed. 2d 309 (1973), it is the duty of a court ". . . to favor an interpretation which would render the statutory design effective in terms of the policies behind its enactment and to avoid an interpretation which would make such policies more difficult of fulfillment, particularly where . . . that interpretation is consistent with the plain language of the statute." *National Petroleum Refiners Ass'n* v. *FTC,* 482 F.2d 672, 689 (D.C. Cir. 1973), *cert. denied* 415 U.S. 951, 94 S.Ct. 1475, 39 L.Ed. 2d 567 (1974).

Thus, the question herein, given the broad reach of the Civil Rights Attorneys' Fees Awards Act of 1976, is whether the Act can be so interpreted in a manner favorable to an award over and against the United States without doing harm to the statutory design. See: *United States* v. *Testan,* 424 U.S. 392, 399, 96 S.Ct. 948, 954, 47 L.Ed. 2d 114 (1976), quoting *United States* v. *King,* 395 U.S. 1, 4, 89 S.Ct. 1501, 23 L.Ed. 2d 52 (1969), cited and quoted from in the discussion of Chief Judge Wright below (dissenting), *supra* at 609 F.2d 521.

In order to give full effect and meaning to attorneys' fees provisions in other civil rights statutes, this Court has broadly construed the language therein. See: *Newman* v.

Piggie Park Enterprises, Inc., 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed. 2d 1263 (1968)[2] where this Court stated that, notwithstanding the statutory language that the District Court "in its discretion" may award costs to a prevailing party, a prevailing party should recover attorneys' fees "unless special circumstances would render such an award unjust", *Id.* at 390 U.S. 402, inasmuch as the aggrieved party is "in the role of 'a private attorney general, vindicating a policy that Congress considered of the highest priority.' " *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 416, 98 S.Ct. 694, 54 L.Ed. 2d 648 (1978), a Title VII matter citing *Newman* v. *Piggie Park Enterprises, supra* at 390 U.S. 402.

The Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. Section 1988, was enacted in specific reaction to this Court's decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 420, 95 S.Ct. 1612, 44 L.Ed. 2d 141 (1975); for in the view of Congress *Alyeska*:

> "Created anomalous gaps in our civil rights laws whereby fees are . . . suddenly unavailable in the most fundamental civil rights cases. For instance, fees are now authorized in an employment discrimination suit under Title VII . . . , but not in the same suit brought under Section 1981, which protects similar rights but involves fewer technical prerequisites to the filing of the action. . ."

Senate Report No. 94-1011, 94th Cong., 2d Sess. 4 (1976).

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[2] In *Newman*, *supra* at 390 U.S. 410, this Court "found that an . . . attorney's fees provision in Title II of the 1964 Civil Rights Act was intended to 'encourage individuals injured by racial discrimination to seek judicial relief' ", *Grubbs* v. *Butz*, 548 F.2d 973, 975, footnote 11 (D.C. Cir. 1976). The Piggie Park rationale was held by this Court to be applicable to Title VII matters in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 415, 95 S.Ct. 2362, 45 L.Ed. 2d 280 (1975).

Since the civil rights laws depend heavily on private enforcement, See: Decision below, *supra* at 609 F.2d 514, 522-523, Wright, C. J., dissenting citing *Parker* v. *Califano*, 561 F.2d 320, 331 (D.C. Cir. 1977),[3] and since such is particularly so where, as here, the Respondents are the United States and employees thereof (including the Attorney General) thereby making the private litigants "attorneys general" in the purest sense of the words, to deny the award herein, based on an extremely narrow interpretation of the statute, would be counter-productive to the focus and emphasis placed upon the private litigant by Congress to enforce the various civil rights laws it has enacted.

Although the Act does not specifically mention liability of the United States for attorneys fees in civil rights cases, not every statutory grant for fees, which has eventually been found to permit the same over and against the United States, has included specific reference to the United States. See: *National Resources Defense Council Inc.* v. *EPA*, 484 F.2d 1331 (1st Cir. 1973) where the First Circuit authorized an award of attorneys' fees over and against the United States notwithstanding that Clean Air Act (42 U.S.C. Section 7604 (d)) referred only to "any party" and did not make reference by specific language to the liability of the United States. See also: *Sierra Club* v. *EPA* (D.C. Cir. 1979) No. 76-1037 consolidated with *ASARCO* v. *EPA* (D.C. Cir. 1979) No. 76-1030, both of which are cited below by Wright, C. J., dissenting, *supra* at 609 F.2d 524.

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[3] See: *Christianburg Garment, Co.* v. *EEOC, supra* at 434 U.S. 418 where this Court most recently acknowledged, in the context of a Title VII matter, that the private litigant "is the chosen instrument of Congress to vindicate a 'policy considered of the highest priority' ", citing *Newman* v. *Piggie Park Enterprises, supra* at 390 U.S. 402. See also: *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714, 716 (5th Cir. 1974), quoting *Culpepper* v. *Reynolds Metals Co.*, 421 F.2d 888, 891 note 3 (5th Cir. 1970) and acknowledging the "importance of enforcement of civil rights legislation."

Thus the language of the Act, itself, as broadly interpreted in order to give effect to its substantive purpose, allows for an award of attorneys' fees over and against the United States; and the decision of the panel majority below to the contrary "will defeat Congress' purpose in enacting Section 1988 insofar as suits against the federal government are concerned."[4] Wright, C.J., dissenting, *supra* at 609 F.2d 531.

2. The legislative history of 42 Section 1988 provides substantial support for the conclusion that Congress intended to authorize attorneys' fees awards against the United States under the Act.

If something other than the statutory language of the Act is necessary to satisfy the proposition that an award of fees over and against the United States is authorized and permitted under the 1976 Civil Rights Attorneys' Fees Awards Act (independent of and/or in conjunction with

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[4] Senator Kennedy, during the course of debate and discussion of the proposed Act, stated in this regard:

> "It is a fundamental axiom of law that where there is a right the law should provide a remedy. Yet, without a provision to permit awards of attorneys' fees to successful parties, the rights secured by those civil rights laws covered by this act are hollow rights indeed. Enactment of this legislation would do much to assure all the citizens of this Nation that the words 'equal protection of law' mean what they say, and that Congress firmly intends that all our civil rights laws be vigorously enforced."

122 Cong.Rec. S16252. See also: Senate Report No. 94-1011, 94th Cong., 2d Sess. 3 (1976), quoting the words of the late Justice Tom Clark:

> "Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose. * * * Without counsel fees the grant of Federal jurisdiction is but an empty gesture * * *. *Hall* v. *Cole*, 412 U.S. 1 [93 S.Ct. 1943, 36 L.Ed.2d 702] (1973), quoting 462 F.2d 777, 780-81 (2d Cir. 1972)."

the broad interpretation of the same, per this Court's rule of statutory analysis), the legislative history can leave no doubt about the same.

While the legislative history, as encompassed within the Congressional debates, appears to be "sparse" (See: *Christianburg Garment Co.* v. *EEOC, supra* at 434 U.S. 420 where this Court noted that the sparcity of legislative history in the context of the attorneys' fees provisions within the Title VII legislation), nevertheless the language of the hearings and debates, which do exist on the subject, overwhelmingly favors the interpretation that the Act was intended to subject the United States to liability for attorneys' fees in the same manner as other litigants.

Both the House and Senate Reports stressed as the purpose of the legislation the need to bring civil rights laws into uniformity. The Senate Report (Senate Report No. 94-1011) gave as the purpose of the legislation:

> "The purpose of this amendment is to remedy anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975), *and to achieve consistency in our civil rights laws.*" (Emphasis added.)

Likewise the House Report (House Report No. 94-1558) stated:

> "H.R. 15460, the Civil Rights Attorneys' Fees Award Act of 1976, authorized the courts to award reasonable attorney fees to the prevailing party in suits instituted under certain civil rights acts. Under existing law, some civil rights statutes contain counsel fee provisions, while others do not. *In order to achieve uniformity in the remedies provided by Federal laws guar-*

> *anteeing civil and constitutional rights,* it is necessary to add an attorney fee authorization to those civil rights acts which do not presently contain such a provision." (Emphasis added).

In opening the Senate floor debates, Senator Hugh Scott, speaking in support of the bill, articulated the view that the Act would "assure that attorneys' fees will be available in suits brought under the reconstruction-era civil rights laws, . . . *in the same fashion and to the same extent as the statute presently provides in cases brought under Title VII of the 1964 Civil Rights Act.*" 122 Cong. Rec. S16251. (Emphasis added). Title VII authorizes recovery of attorneys' fees from the United States.

On the House side, the bill's floor manager, Congressman Drinan, in like vein, articulated the position that "the language of S. 2278 tracks the wording of attorney fee provisions in other civil rights statutes, such as section 706 (k) of Title VII—employment—of the Civil Rights Act of 1964." 122 Cong. Rec. H 12159.[5]

Significantly, Senator Allen, who was a principal opponent of the bill and who lead a filibuster against it, sponsored an amendment which would have limited the liability of the United States to situations in which an official of the federal government "has acted in a contuma-

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[5] Significantly, Congress recently enacted Section 505(b) of the Rehabilitation, Comprehensive Services and Development Disabilities Amendments of 1978, Pub. L. 95-601, an attorneys' fees provision whose language is virtually the same as that of Section 1988 and which, in the words of its principal sponsor, Senator Cranston, "parallels the Civil Rights Attorneys' Fees Awards Act of 1976. . ." 124 Cong. Rec. S 15590. The Sponsor made it clear that the attorneys' fee provision was designed to "vindicate rights against the federal government." Wright, C.J., *supra* at 609 F.2d 525, citing 124 Cong. Rec. S 15590; Senate Report No. 95-890, 95th Cong., 2d Sess. 19 (1978).

cious or vexatious manner." 122 Cong. Rec. S 16567. The Amendment was rejected.[6]

The colloquy between Congressman Quie and Congressman Railsback, who was the ranking Republican on the House Judiciary Subcommittee (which drafted the House version of the legislation which eventually became Section 1988) and who was a strong supporter of the bill, is instructive and makes it quite clear that the Act did apply to the United States.

> "Mr. Quie. I would like to ask the minority member, the gentleman from Illinois [Mr. Railsback], a question.
>
> First I would like to ask if the U.S. Government is the plaintiff in a civil rights case against an individual or corporation, can that individual or corporation as the prevailing party be awarded attorney's fees against the U.S. Government?
>
> . . . .
>
> Mr. Railsback. [A]s I read the bill before us, my answer would be yes. What we do is limit the United States from recovering but we do not limit the rights of other prevailing parties to recover in the event the United States would be the plaintiff in an action such as described in the bill."

122 Cong. Rec. H 12163. Continuing, Mr. Railsback stated:

> "Mr. Railback. [A]s I read the bill before us, we limit the right of the U.S. Government to recover, *we do not limit it in a case where the United States would be the plaintiff suing a defendant, we do not limit the*

[6] Senator William Scott, another opponent of the bill, also offered an amendment which would have denied recovery against the United States and state and local governments. That amendment was defeated as well. 122 Cong. Rec. S 16881.

> *defendant's right to recover. Where the judge might decide that a prevailing defendant should recover, we do not limit the defendant from recovering from the United States in civil rights cases.*"

Id. at H 12163-12164 (Emphasis added).

Still further evidence of the Congressional intent in this respect is reflected in another colloquy between Congressman Railsback and Congressman Qui:

> ". . . [I]f the United States is the plaintiff and loses a civil rights case against a school district or college, can that school district or college as the prevailing party be awarded attorneys' fees against the U.S. Government?
>
> Mr. Railsback . . . [A]gain it would be in the discretion of the court and *nowhere in the bill do we prevent a school district or college from recovering reasonable attorneys' fees, even in a case where the United States is a party plaintiff.*"

Id. at H 12164 (Emphasis added).

Speaking in absolutely clear terms, Congressman Drinan, in introducing H.R. 9552, which became the House version of the legislation and which is virtually identical to Section 1988 as it passed Congress, stated:

> "[U]nder these bills the Federal government could never recover its attorney fees. *On the other hand, it would be required to pay the counsel fees of a private prevailing party, which is prohibited generally by current law (See 28 U.S.C. 2412). These bills, if enacted, would be exceptions to the general prohibition in 28 U.S.C. 2412. That section need not be amended, however, since it now states: 'Except as otherwise specifically provided by statute. . . .'*"

Awarding of Attorneys' Fees, *Hearings Before the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice,* 94th Cong., 1st Sess. 53 (1975) (Emphasis added).

While this Court has recognized the limitations of testimony before committee hearings as a means to statutory construction, See: *S & E Contractors, Inc.* v. *United States,* 406 U.S. 1, 13, note 9, 92 S.Ct. 1411, 31 L.Ed. 2d 658 (1972), nevertheless weight should be accorded to the same where, as here, chief sponsors and proponents of the bill offer testimony which consists "of precise analyses of statutory phrases . . . of the proposed laws." *Id.*

Most significantly, the position of the United States, as articulated in the Circuit Court below (for the first time), is absolutely inconsistent with its view of the scope of the Act when it was being proposed and debated, prior to its enactment. At hearings relative thereto, the United States Department of Justice, by Assistant Attorney General Rex R. Lee, acknowledged that the Act would authorize fee awards against the federal government. In *supporting* the same, Mr. Lee stated:

> "H.R. 8220 would authorize the awarding of attorney's fees to a prevailing plaintiff in actions brought under certain civil rights statutes. Actions under the statutes involved have been brought against both Federal officials and private individuals.
>
> H.R. 9552 authorizes the awarding of attorneys' fees as a matter of discretion in certain civil rights litigation. The prevailing party, other than the United States, may recover attorneys' fees.
>
> Thus, H.R. 9552 applies *to all plaintiffs or defendants except to the United States to the extent that it is a prevailing party.*"

Awarding of Attorneys' Fees, *Hearing Before the House Judiciary Subcommittee on Courts, Civil Liberties and Administration of Justice,* 94th Cong., 1st Sess. 176-177 (1975) (Emphasis added).

Mr. Lee went on to state:

> "[The Department of Justice expressed] support in principle for H.R. 8220 and H.R. 9552, awarding of attorneys' fees to a prevailing party in civil rights actions under the revised statutes (sections 1981, 1982, and 1983, 1985, and 1986, of title 42 United States Code)."

Awarding of Attorneys' Fees, *Hearings Before the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice,* 94th Cong., 1st Sess. 179 (1975).

Both the House Report and the floor debates referred to Mr. Lee as a principal source of interpretation for Section 1988. See: House Report No. 94-1558; 122 Cong. Rec. H12162.[7] This Court has acknowledged that the contemporaneous views and interpretations of laws by the agencies entrusted with their enforcement "constitute a body of experience and informed judgment to which courts and liti-

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[7] Among other cases referred to in the House Report, citing various governmental defendants in civil rights actions over and against whom attorneys' fees could be awarded because of the substantiality of the common treasury (including therein taxes paid by the very civil rights litigants), was *Hills* v. *Gautreaux,* 425 U.S. 284, 96 S.Ct. 1538, 47 L.Ed.2d 792 (1976), a Title VI claim brought against the federal government. House Report No. 94-1558, 94th Cong., 2d Sess. 7 (1976).

In addition to *Hills* the House carefully set forth cases reflecting city and county officials and agencies and state officials and agencies. See: *Brown* v. *Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) and *O'Connor* v. *Donaldson,* 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975), respectively. Thus it is apparent the House clearly envisioned federal defendants as appropriate "persons" over and against whom civil rights actions could be brought and from whom fees could be secured.

gants may properly resort for guidance". *Skidmore* v. *Swift Co.*, 323 U.S. 134, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944). Such weight does not, however, attach when the interpretation given comes at a time subsequent to the enactment of the legislation in focus and when it is inconsistent with the initial views as expressed by the agency. See: *General Electric Company* v. *Gilbert*, 429 U.S. 125, 142-143, 97 S.Ct. 401, 411, 50 L.Ed. 2d 343 (1976). See also: *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 858-859 note 25, 95 S.Ct. 2051, 44 L.Ed. 621 (1975); *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 92-96, 94 S.Ct. 334, 38 L.Ed. 287 (1973), both of which are cited in *Gilbert, supra* at 429 U.S. 143.

It is significant that, in the District Court, the United States, consistent with the proposition articulated by Assistant Attorney General Lee at the pre-enactment hearings on the legislation, did not raise the issue of the propriety of an award against the United States under the Act thereby confirming and acceding to its initially promulgated and articulated view. It was only on appeal and after the District Court had issued an award that the United States modified the original interpretation which it placed on the Act (vis à vis an award of fees over and against the federal government). In such light, the latter interpretation, being inconsistent with the United States' position, initially, should be rejected, as Wright, C.J. did in dissent below.

In short, "not only the words and history of [the Act] but also its subject matter and the underlying purposes, counsel . . .", *Cannon* v. *University of Chicago*, —— U.S. ——, 99 S.Ct. ——, 60 L.Ed. 2d 560, 585 (1979), an interpretation favoring the award of attorneys' fees over and against the United States, particularly in view of the fact that the failure of Congress not to specifically include the United States by reference[8] "is not inconsistent with an

intent on its part to have such a remedy available to the persons benfited by the legislation." See: *Cannon* v. *University of Chicago, supra* at 60 L.Ed. 2d 587.

Thus, the decision of the panel majority below is contrary to the purposes, language and legislative history of the Act.

3. The decision of the panel majority below is in conflict with the decision of the United States Court of Appeals for the Seventh Circuit in *Hampton* v. *Hanrahan,* 600 F.2d 600, 643-644 (7th Cir. 1979), *appeal pending,* in which the Court awarded attorneys' fees to the Plaintiffs-Appellants therein for their successful efforts on appeal, per 42 U.S.C. Section 1988 (the Civil Rights Attorneys' Fees Awards Act of 1976), reaffirming therein the position that ". . . the Act permits a prevailing plaintiff on appeal to receive fees for appellate work." *Id.* at 600 F.2d 643, citing *Davis* v. *Murphy,* 587 F.2d 362 (7th Cir. 1978).

In a subsequent opinion, unpublished (set forth herein as Appendix K), *Second Petition for Rehearing en banc* (United States) *pending* (on the propriety of the award of fees over and against the United States), the Court made it clear that the award of fees was to be apportioned among the state and local Defendants-Appellees and the federal Defendants-Appellees (including several Justice Department officials and agents and employees of the Federal Bureau of Investigation). Moreover, it specified

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[8] Speaking in this respect, Wright, C.J., dissenting, stated (*supra* at 609 F.2d 525):

> "That Congress omitted the language specifically referring to the liability of the United States for attorneys' fees is not significant. Given all the indications that Congress intended Section 1988 to be just like the other civil rights attorneys' fees provisions, it is reasonable to assume that if Congress had intended to depart from the norm by immunizing the federal government from liability it would have done so explicitly." (Footnote omitted).

that said fees were to be collected from said persons in their official capacities (rather than as individuals), thus requiring the fees to come from the treasury of the United States (to the extent that said fees were assessed over and against those officials) rather than from the pockets of the individual federal officials/employees.

Thus, it is apparent that a division does exist among and between the Circuit Courts of Appeals as a consequence of the decision of the panel majority below (over the dissent of Wright, C.J.). Accordingly, because of the implication and importance of the issue, this Court should entertain the Petition herein and address the same.

4. The statutory issue herein (the propriety of the award of attorneys' fees over and against the United States under 42 U.S.C. Section 1983) was improperly addressed by the Circuit Court below since the matter had not been raised by the Respondents before the District Court and since the issue is not jurisdictional in nature. As such, the Court below should not have addressed the same and, in doing so over the objection of the Petitioners, it was and is in conflict with the decision of the United States Court of Appeals for the Eighth Circuit in *Feltz* v. *Central Nebraska Public Power and Irrigation District,* 124 F.2d 578 (8th Cir. 1942) and with its own decision in *National Treasury Employees Union* v. *Nixon,* 521 F.2d 317 (D.C. Cir. 1975).

In *National Treasury Employees Union* v. *Nixon, supra* at 521 F.2d 317, the Court held that, where the District Court had jurisdiction over the subject matter, it had jurisdiction to determine whether attorneys' fees could be allowed. It stated:

> "This argument confuses subject matter jurisdiction with the substantive law governing appellant's application. The District Court has the power to entertain the application for attorneys' fees and expenses be-

> cause it has subject matter jurisdiction over the main claim. The award of attorneys' fees is not a separate claim for relief requiring an independent base, but rather is an additional equitable remedy which under appropriate conditions can be awarded to the prevailing party."

In *Feltz* a condemnation action was brought by a public power and irrigation district under the Federal Power Act. The landowners involved sought to raise the issue of jurisdiction in the Court of Appeals, articulating the position that the power district was not authorized under the Act to take the land.

The court held that, while the issue of jurisdiction may be raised at any time, such an issue was not involved in the case. Whether the power district was authorized to use the Federal Power Act for condemnation purposes was held to be a matter of statutory interpretation, which was waived by the appellant's failure to raise it in the District Court.

A similar situation exists herein. The District Court had jurisdiction to interpret the Civil Rights Attorneys' Fees Awards Act. As the District Court noted in its opinion awarding fees, the United States did not contest the court's jurisdiction to do so:

> *"Defendants do not context the validity of applying this act retroactively or to obtain an award from the government. See S. Rep. No. 04-1011, 94th Con., 2d Sess.* 4-5 (1976). They do context plaintiffs' status as prevailing parties under the statutory scheme. . . ."

See: Appendix C herein (Emphasis added).

Thus, as in *Feltz* and *Nixon* respectively, the issue addressed by the Court below (whether the Act permitted

a recovery over and against the United States) was substantive rather than jurisdictional;[9] and, accordingly, it was improperly addressed by the Court since the Respondents did not contest the propriety of an award under the Act in the District Court below (as contrasted to the propriety of the finding that the Petitioners were prevailing parties),[10] thereby making the same the subject of review on appeal.

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[9] As one of the issues (questions) presented by the Respondents in the Court below, they proposed that the Court consider "whether the district court had jurisdiction to award fees in this case, pursuant to the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. 1988." While such was an ingenious method of framing the issue, in light of the jurisdictional concession by the Respondents in the District, such does not hold water otherwise since the issue is not jurisdictional but substantive (by way of statutory interpretation).

[10] As discussed above, Petitioners believe that the only issue properly before the Appeals Court below was whether they were prevailing parties in the District Court so as to permit an award of attorneys' fees under the 1976 Act. Although the panel majority below did not address that issue, Chief Judge Wright, in his dissenting opinion, did discuss the same and concluded that, because the District Court had "properly identified the test for a prevailing party" (to wit: "Whether the party had accomplished the objectives of his litigation . . .", citing therein *Parker* v. *Matthews*, 411 F.Supp. 1059, 1064 (D.D.C. 1976), *affirmed sub nom. Parker* v. *Califano*, 561 F.2d 320 (D.C. Cir. 1977) and because it had not abused its discretion in that regard, the prevailing party finding should not be reversed. See: Wright, C.J., dissenting, *supra* at 609 F.2d 530-531. Petitioners agree with Judge Wright's analysis in that regard and adopt the same for the purposes of framing the issue which they raise for review herein.

CONCLUSION

For the foregoing reasons, the Petition herein should be granted.

Respectfully submitted,

.....

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BY: .....

April 1, 1980

Certificate of Service

James I. Meyerson, one of the attorneys for the Petitioners, certifies that on the 2nd day of April, 1980, I did serve three copies of the foregoing Petition upon the attorneys for the Respondents by mailing the same, postage prepaid, first class, as follows: Drew Days, Esq., Assistant Attorney General, Walter W. Barnett, Esq., Cynthia L. Attwood Esq., Attorneys, Department of Justice, Washington, D.C. 20530.

Respectfully submitted,

.....

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Appendix

Appendix A

(Memorandum Opinion)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-1317

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,

Plaintiffs,

v.

EDWARD LEVI, *et al.*,

Defendants.

APPEARANCES

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Appendix A

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Attorneys for Defendants

Before

BARRINGTON D. PARKER
UNITED STATES DISTRICT JUDGE
Decided: September 3, 1976

FILED
Sep 3 1976
JAMES F. DAVEY, Clerk

MEMORANDUM OPINION

Barrington D. Parker, District Judge:

This proceeding presents troublesome questions of standing and prosecutorial discretion. They arise in connection with a citizen's death from gunshot wounds while in custody of Arkansas law enforcement officers. The plaintiffs allege that Federal officials failed to conduct an affirmative and exhaustive investigation of the incident and that they acted arbitrarily, capriciously and in a racially discriminatory manner to determine if the citizen's constitutionally guaranteed and other rights provided by Federal law had been violated.

At this point the defendants present two challenges to the litigation: a motion for a change of venue and a motion

to dismiss. For the reasons detailed below, the Court concludes that these initial challenges should be denied and that this proceeding should advance to trial.

The plaintiffs are the National Association for the Advancement of Colored People (NAACP), Mrs. Clementine Russ, widow of Carnell Russ and the Russ minor children.[1] The defendants are Edward Levi, the Attorney General of the United States, Clarence Kelley, the Director of the Federal Bureau of Investigation (FBI or Bureau) and certain FBI agents assigned to the Little Rock, Arkansas office.

Jurisdiction is asserted under 28 U.S.C. §1343(4) together with the Fifth, Thirteenth and Fourteenth Amendments and the Civil Rights Acts (42 U.S.C. §§1981 and 1985). Also, 28 U.S.C. §1361 in conjunction with 18 U.S.C. §242, 28 U.S.C. §509 and the Civil Rights Acts (42 U.S.C. §1981) are invoked as grounds for jurisdiction.

In an amended complaint seeking declaratory, injunctive and other equitable relief, plaintiffs assert violations of the constitutional and civil rights of Carnell Russ, deceased, a citizen of Arkansas. They seek this Court's aid compelling the defendants to undertake a thorough and meaningful investigation into his fatal shooting. The shooting took place at the Lincoln County Courthouse, Star City, Arkansas, while Russ was in the custody of Arkansas law enforcement officers.

A motion to transfer the proceedings to the Eastern District of Arkansas has been filed by the defendants. They also move to dismiss the complaint and assert: that the plaintiffs lack standing to bring this suit; that they

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[1] Mrs. Russ brings suit as mother and next friend of her minor children.

have failed to state a claim upon which relief can be granted; that the Court lacks jurisdiction over the subject matter of the complaint, and; that the doctrine of sovereign immunity shields the defendants from this litigation.

FACTUAL BACKGROUND[2]

On May 31, 1971, Carnell Russ, a 24 year old black, while operating his motor vehicle on an Arkansas highway was arrested for an alleged speeding violation by Jerry Mac Green, a white state trooper. Russ was accompanied by his wife, their minor children and an adult cousin. The trooper directed him to the County Courthouse. Russ complied and upon arrival, parked his vehicle and was escorted into the Courthouse by the arresting trooper and two other white law enforcement officers, Charles Ratliff and Norman Draper.[3] Minutes later, Russ returned to the vehicle where his family awaited. He requested and received from his wife sufficient money to post the necessary collateral. He then joined the three officers who were close by observing his actions. The four retraced their steps with Russ again in custody.

A short time thereafter, Mrs. Russ first observed two of the officers leave and minutes later an ambulance depart from the rear of the Courthouse area where her husband had just entered in the officers' custody. She later learned that Mr. Russ, while under detention, had been shot in the center of his forehead by Ratliff and then transported to a hospital. Green and Draper were the sole witnesses to the

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[2] The complaint, affidavits, exhibits and memoranda filed by the plaintiffs in this proceeding are the source of the factual statement. At this point they are undisputed.

[3] Norman Draper was in a "trainee" status.

shooting. Her husband died from the gunshot wound within hours.

The Governor of Arkansas ordered an immediate investigation of the incident by the State Police. In less than one week Ratliff was indicted for voluntary manslaughter. Plaintiffs allege that minutes or transcripts of the grand jury proceedings were not maintained. Ratliff was tried in January 1972. The jurors' deliberations consumed less than 15 minutes and in that period they selected a foreperson, reviewed and considered the evidence and returned a verdict of "not guilty". Ratliff's weapon was not offered in evidence during his criminal trial. There was no evidence or testimony that Carnell Russ possessed or had access to a weapon while in custody. Indeed, the testimony was to the contrary.

The shooting triggered the attention of both the national and Arkansas branches of the NAACP. Immediately, those organizations embarked upon a campaign importuning the Justice Department to undertake an independent investigation to determine whether Federal laws had been violated in any manner. Several months following the acquittal of the state trooper, Assistant Attorney General, David L. Norman of the Civil Rights Division of the Justice Department wrote to the General Counsel of the NAACP

> After careful examination of the [Ratliff trial] transcript, as well as materials previously submitted by the Federal Bureau of Investigation, this Division has determined that this incident lacks prosecutive merit under federal criminal civil rights statutes. Therefore, we are closing our file.[4]

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[4] Undated letter attached as an exhibit to the complaint. Plaintiffs refer to this letter as "dated March 1972."

The plaintiffs allege that subsequent events and disclosures led them to believe that the Department's investigation was superficial, less than thorough and meaningless. The substance of their claim is that the FBI abdicated its responsibility and in effect applied a "whitewash" to the incident; that the Bureau deferred to and relied principally upon a report of the Criminal Investigation Division of the Arkansas State Police; and that the policy to rely solely on state and local criminal justice system for vindication of a citizen's rights was unreasonable, improper, arbitrary and without a rational basis. Fairly read, the complaint alleges that the defendants acted in an arbitrary, capricious and discriminatory manner by failing to investigate the Russ shooting to determine if his constitutional rights and Federal statutes had been violated by Arkansas law enforcement authorities.

THE VENUE MOTION

The defendants urge the transfer of this litigation to the Eastern District of Arkansas to accommodate the parties and witnesses and to serve the interests of justice. They contend that the majority of the parties are Arkansas residents; most of the witnesses likely to be called are residents of that State; that most of the significant and underlying events, the death, the grand jury investigation of the death, and the subsequent indictment and trial of the state troopers, all took place in Arkansas. Further, they point out that several related and companion civil cases stemming from Russ' death were filed, considered and tried in the Eastern District of Arkansas.[5]

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[5] The Russ plainiffs filed a civil suit in the District Court for the Eastern District of Arkansas pursuant to 42 U.S.C. §1983 and

In turn, the plaintiffs argue that the central issue in this litigation involves a denial and deprivation of constitutional and civil rights and the focus is on the official actions and decisions of a Federal government agency—the Department of Justice and specifically, the Office of the Attorney General and the Federal Bureau of Investigation. The administrators and officials responsible for the final agency action are headquartered in this jurisdiction. The data, reports and memoranda relating to the investigation conducted by the FBI and the Justice Department, if not located here, could certainly be made available with a minimum of delay and difficulty. The final decision of the Department of Justice, closing the books on this matter was made in Washington, D. C.

While all of the data and evidence supporting the final decision were conceivably accumulated in Arkansas, a final review and determination was made by Federal officials stationed in this jurisdiction. *See: Starnes* v. *McGuire,* 512 F.2d 918 (D.C. Cir. 1974). Nor is there any suggestion in defendants' memorandum that an agency representative or witness would be harassed, inconvenienced, disadvantaged or that any unusual and unnecessary problems would arise in the absence of a transfer. Indeed, it would appear that the Russ plaintiffs would be more adversely affected than the defendants.

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the Arkansas Wrongful Death Act, seeking damages from the three officers and various officials of Star City, Arkansas for the death of Carnell Russ. The trial court directed a verdict dismissing the claims against all defendants except officers Green and Ratliff. The jury returned a finding in favor of the two officers. An appeal was then taken to the Eighth Circuit and in a recent unanimous opinion, that court reversed and remanded the case for a new trial against Ratliff and otherwise affirmed the judgment of the trial court. Carnell Russ v. Charles Lee Ratliff, No. 76-1007 (8th Cir., July 27, 1976).

Appendix A

The plaintiffs have made what is presumed to be a considered and deliberate choice of forums. Their choice is entitled to serious consideration and should not be disturbed absent a strong showing that their chosen forum is completely inappropriate and inconvenient, a matter which this Court must resolve by an exercise of its discretion. *Norwood* v. *Kirkpatrick*, 349 U.S. 29, 31 (1955); *Hoffman* v. *Goberman*, 420 F.2d 423, 426-428 (3rd Cir. 1970). The defendants have not made such a showing. Their motion is denied.

THE MOTION TO DISMISS

The Question of Standing

For more than the last 50 years the NAACP has participated as party plaintiff, as intervenor and as *amicus curiae* in a variety and ever increasing amount of civil rights litigation. On behalf of its membership and black minorities it has achieved a reputation in both state and Federal courts as an organization with a special interest in the preservation and protection of their civil and constitutional rights. In 1963, Justice William J. Brennan recognized the standing of the NAACP to assert the rights of its members and remarked that the organization engages in litigation

> . . . [as] a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country.[6]

• • •

[6] NAACP v. Button, 371 U.S. 415 at 429 (1963).

> . . . the litigation it assists, while serving to vindicate the legal rights of members of the American Negro community, at the same time and perhaps more importantly, makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society.[7]

That same observation is true today and as the plaintiffs have pointed out, the standing of this organization to sue and represent its members and nonmembers in the context of its objectives has never been denied in any reported judicial opinion.[8]

The NAACP's interest in the issues presented in this litigation is not abstract or general but rather it is real and direct. In their pleadings and affidavits the plaintiffs point to the past and continuing efforts of the organization to secure the civil rights of its memberships and others under Federal law against the arbitrary and discriminatory acts of government officials. Likewise, the Russ widow and children have a direct, significant and substantial interest. Accepting as true, as we must, the plaintiffs' allegations detailing the highly suspect circumstances of Mr. Russ' death, the government's investigation of the incident to determine if there had been a violation of Federal laws, was half-hearted at best. The family seeks a vindication of the deceased's rights and requests equitable relief against named Federal officials.

The plaintiffs have an interest in free access to and an even-handed application of the legal and criminal justice

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[7] Id. at 431.

[8] Memorandum in Opposition to the Motion of the Defendants for a Change of Venue and to Dismiss the Action Herein, p. 49 filed December 29, 1975.

procedures of the Federal Government. They allege that they were injured because of the defendants' failure to undertake a sincere and meaningful investigation of Carnell Russ' death. This failure, they claim, was racially discriminatory and had the effect of denying to him, his family and to black Americans equal application of the laws in violation of their rights under the Constitution and the Civil Rights Acts. The Court concludes that the plaintiffs have shown that they satisfy the injury in fact element of the standing requirement.[9] The Constitutional and statutory enactments which the plaintiffs invoke are for the protection of persons against discriminatory treatment by government officials. Thus, the plaintiffs have shown that they are within the zone of interest protected by such enactments.[10] Since the NAACP has long been committed to the civil rights struggle and because the Russ plaintiffs have an obvious desire to vindicate the rights of their deceased husband and father, the "logical nexus" between the plaintiffs' status and the government action from which they seek relief is also present.[11]

The government contends that plaintiffs lack standing since they have not shown that they have a sufficient "personal stake in the outcome of the controversy" *Baker* v. *Carr,* 369 U.S. 186, 204 (1962); have not shown that injuries have been or will be sustained by them; and, because the "logical nexus" between any injury to the NAACP and the Russ family on the one hand and the government action complained of is insufficient or absent. In adopting

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[9] Sierra Club v. Morton, 405 U.S. 727, 738 (1972).

[10] Ass'n. of Data Processing Service Organizations v. Camp, 397 U.S. 150, 153 (1970).

[11] Flast v. Cohen, 392 U.S. 83 (1968).

this stance they rely principally on *Linda R.S.* v. *Richard D.*, 410 U.S. 614 (1973). There, the mother of an illegitimate child challenged as unconstitutionally discriminatory the application of a Texas criminal statute prohibiting the willful refusal of a parent to support his child on the ground that it was enforced by the state, as a result of state court interpretation of the statute, against married but not unmarried fathers. In holding that she lacked standing the majority court observed

> . . . we hold that, in the unique context of a challenge to a criminal statute, appellant has failed to allege a sufficient nexus between her injury and the government action which she attacks to justify judicial intervention. To be sure, appellant no doubt suffered an injury stemming from the failure of her child's father to contribute support payments. But the bare existence of an abstract injury meets only the first half of the standing requirement. 'The party who invokes [judicial] power must be able to show . . . that he has sustained or is immediately in danger of sustaining some *direct* injury *as the result of* [a statute's] enforcement.' (citations omitted) As this Court made plain in *Flast* v. *Cohen, supra,* a plaintiff must show 'a logical nexus between the status asserted and the claim sought to be adjudicated. . . . Such inquiries into the nexus between the status asserted by the litigant and the claim he presents are essential to assure that he is a proper and appropriate party to invoke federal judicial power. . . .' 410 U.S. at 617, 618.

The majority opinion of Justice Thurgood Marshall further stated ". . . that, in American jurisprudence at

least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Id.* at 619.

This historic role of the NAACP in its efforts to secure for its members and others through litigation, the guaranteed civil rights which have been denied, cannot be ignored. Had Carnell Russ survived his encounter with the Arkansas law enforcement officers, there would be no question of his standing. Before this Court in his stead is the Russ family, seeking a vindication of his rights under law. The allegations of the complaint support the conclusion that they too have standing.

Failure to State a Claim and Prosecutorial Discretion

A prosecutor's chief responsibility is to see that the laws are faithfully executed and enforced in order to maintain the rule of law. He has an affirmative responsibility to investigate prudently suspected illegal activity when it is not adequately pursued by other agencies.[12] In *Linda, supra,* the question of standing focused on whether or not the plaintiff was an appropriate person to request judicial intervention—and more specifically, whether the victim of criminal acts may sue to correct allegedly unlawful prosecutorial conduct. Federal courts have traditionally acquiesced in discretionary decisions of the United States Attorney not to prosecute persons against whom a complaint of criminal conduct is made. The rule in this circuit

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[12] *See* generally: A.B.A. Standards Relating to the Administration of Criminal Justice, The Prosecution Function, Part III (1974).

is not otherwise. *United States* v. *Gainey*, 440 F.2d 290 (D.C. Cir. 1971); *Newman* v. *United States*, 382 F.2d 479 (D.C. Cir. 1967); *Powell* v. *Katzenbach*, 359 F.2d 234 (D.C. Cir. 1965); *Moses* v. *Katzenbach*, 342 F.2d 931 (D.C. Cir. 1965); *Moses* v. *Kennedy*, 219 F.Supp. 762 (D.D.C. 1963). Even though judicial restraint is generally observed, an unfettered discretion is questionable when it fails to promote the ends of justice and denies rights conferred upon a citizen by the Constitution and by Federal law.

In *Nader* v. *Saxbe*[13] our Court of Appeals was concerned with an application for a mandatory injunction against the Attorney General and others to exercise their discretion to initiate prosecutions against violators of the Federal Corrupt Practices Act.[14] The plaintiffs were an individual citizen and a nonprofit corporation. The Act was enacted in 1925. While many violations had been committed, only one prosecution, a test case, had been brought. The Attorney General had exercised his prosecutorial discretion of nonenforcement.

The case was mooted by the repeal of the statute during the course of the litigation. However, Circuit Judge J. Skelly Wright suggested that prosecutorial discretion was not totally free from judicial review

> The instant complaint does not ask the court to assume the essentially Executive function of deciding whether a particular alleged violator should be prosecuted. Rather, the complaint seeks a conventionally judicial determination of whether certain fixed policies allegedly followed by the Justice Department and the United States Attorney's office lie outside the con-

[13] 497 F.2d 676 (D.C. Cir. 1974).

[14] 43 Stat. 1070, et seq., 2 U.S.C. former §§241-256.

stitutional and statutory limits of 'prosecutorial discretion.' 497 F.2d at 679.

In a continuing footnote he further commented

> The Executive's constitutional duty to 'take Care that the Laws be faithfully executed,' Art. II, §3, applies to all laws, not merely to criminal statutes, *see* In re Neagle, 135 U.S. 1, 63-64, 10 S.Ct. 658, 34 L.Ed. 55 (1890). It would seem to follow that the exercise of prosecutorial discretion, like the exercise of Executive discretion generally, is subject to statutory and constitutional limits enforceable through judicial review. (citations omitted) The law has long recognized the distinction between judicial usurpation of discretionary authority and judicial review of the statutory and constitutional limits to that authority. (citations omitted) Judicial review of the latter sort is normally available unless Congress has expressly withdrawn it. (citations omitted) 497 F.2d at 679, 680, fn. 19.

The judiciary has the responsibility of assuring that the purpose and intent of congressional enactments are not negated and frustrated by arbitrary conduct of government officials.[15] In *Medical Committee for Human Rights* v. *S.E.C.*, 432 F.2d 659 (D.C. Cir. 1970), Circuit Judge Edward A. Tamm noted

> [T]he decisions of this court have never allowed the phrase 'prosecutorial discretion' to be treated as a magical incantation which automatically provides a shield for arbitrariness. 432 F.2d at 673.

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[15] *See*: DeVito v. Schultz, 300 F. Supp. 381 (D.D.C. 1969).

Appendix A

The amended complaint, together with supporting affidavits and memoranda show: that named defendants undertook a token investigation to determine if a citizen's rights had been violated by Arkansas law enforcement personnel; that the Department of Justice adhered to a general policy when there were alleged violations of an individual's constitutional and civil rights by state officials, namely deferring to state criminal investigation rather than its own affirmative and objective investigation; that this policy was followed by the Attorney General in the Russ investigation; that the Federal Bureau of Investigation at the time was less than vigorous and diligent in investigating charges of unlawful conduct of state law enforcement officers against black individuals. This, the plaintiffs claim, was arbitrary and racially discriminatory conduct by Federal officials. They should be afforded an opportunity to support these allegations.

Lack of Subject Matter Jurisdiction
and
Sovereign Immunity

The amended complaint invokes jurisdiction primarily under 28 U.S.C. §1343(4) and §1361 in conjunction with the Fifth, Thirteenth and Fourteenth Amendments, the Civil Rights Acts (42 U.S.C. §§1981 and 1985), and 18 U.S.C. §242. Section 1343(4) confers jurisdiction in a district court to grant equitable or other relief under any Act of Congress providing for the protection of civil rights. Section 1361 authorizes mandamus actions.

The defendants question the applicability of §1981 and suggest that it does not generally support a cause of action charging discrimination by Federal officials or the Federal government. There is, however, persuasive authority to

the contrary which this Court recognizes. *Penn* v. *Schlesinger*, 400 F.2d 700 (5th Cir. 1973); *Baker* v. *F & F Investment Co.*, 489 F.2d 829 (7th Cir. 1973). Further, Congress has explicitly given district courts power to consider cases in the nature of mandamus against Federal officials. When it is claimed that Federal officials are acting contrary to law, abusing their discretion and acting outside the limits of their permissible discretion, and when official conduct extends beyond any rational exercise of discretion, even though it is within the letter of the authority granted, mandamus affords the appropriate judicial relief.

Nor does the defense of sovereign immunity, as defendants urge, serve as an absolute jurisdictional bar to the maintenance of this action against the named defendants. *See: Scheuer* v. *Rhodes*, 416 U.S. 232 (1974); *Economou* v. *Department of Agriculture*, 44 U.S.L.W. 2516 (May 11, 1976). If they have engaged in racially discriminatory practices, proscribed by §§1981 or 1985 the plaintiffs should not be stopped at the threshold. Where the manner in which public officials exercise their authority is challenged as contrary to constitutional and statutory mandates, the doctrine of sovereign immunity may not prevail. *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 702 (1949). While the plaintiffs may be limited as to the extent of the relief afforded by the Court, a consideration of that aspect at this time is speculative and premature. There is no sound basis for this Court to deny subject matter jurisdiction and sovereign immunity may not be asserted to avoid a hearing on the merits.

In *Scheuer* v. *Rhodes*, Mr. Chief Justice Burger, in delivering the opinion for the court remarked

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either

by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action the allegations of the complaint should be construed favorably to the pleader. 416 U.S. 232 at 236 (1974).

On basis of the foregoing it is this 3rd day of September, 1976

ORDERED that the motions of the defendants for a change of venue and to dismiss the complaint are denied, and it is

FURTHER ORDERED that the defendants shall respond forthwith to the plaintiffs' request for production of documents and submit answers to the plaintiffs first set of interrogatories by October 8, 1976.

/s/ BARRINGTON D. PARKER
Barrington D. Parker
United States District Judge

Appendix B

(Supplemental Memorandum Order)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-1317

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,

Plaintiffs,

v.

GRIFFIN B. BELL, *et al.*,

Defendants.

On July 12, 1977, the parties to this litigation moved jointly to dismiss these proceedings without prejudice to renewal by the plaintiffs. The basis of this request was an announced policy of the Honorable Griffin B. Bell, Attorney General of the United States,[1] dealing with federal prosecution for violation of criminal civil rights statutes. The primary objective of the plaintiffs in this cause of action was to ensure that the United States Department of Justice did not fail to vindicate federally protected interests by not prosecuting local law enforcement officers alleged to have violated federal criminal civil rights statutes simply because state or local authorities had already prosecuted those officers for state or local offenses arising from the same conduct. The Attorney

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[1] When the action was instituted on August 12, 1975, Mr. Edward Levi was the Attorney General of the United States. He has since resigned that office and the Court, *sua sponte*, has substituted the present incumbent, Griffin B. Bell, as party defendant.

General, however, has recently issued a memorandum that states that federal prosecution will be instituted whenever necessary to vindicate federally protected interests regardless of whether prior state prosecution has occurred.[2] Since this memorandum is in accord with the policy objectives which underlie this suit and, in any event, may have rendered this cause of action moot,[3] the parties have concluded that no useful purpose would be served by the continued litigation of this lawsuit.

Accordingly, it is this 16th day of August, 1977,

ORDERED that the cause of action is dismissed without prejudice to reinstitution of the lawsuit in the event that the defendants fail to comport with the standards set forth in the aforementioned memorandum, Exhibit A hereto, and without prejudice to the plaintiffs' right to petition for attorneys' fees.

/s/ BARRINGTON D. PARKER
Barrington D. Parker
United States District Judge

Copies to:

J. FRANCIS POHLHAUS
JAMES I. MEYERSON
Attorneys for Plaintiffs

DANIEL F. RINZEL
BRUCE J. BERGER
Department of Justice
Attorneys for Defendants

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[2] The policy statement is attached hereto as Exhibit A.

[3] *See* e.g., Boxley v. Rodgers, 129 App. D.C. 408, 395 F.2d 631 (1968); Beringhelle v. Richardson, 457 F.2d 345, 346 (9th Cir. 1972). *See* also Nader v. Volpe, 154 App. D.C. 332, 333-34, 475 F.2d 916, 917-18 (1973).

Appendix B

Exhibit A

MEMORANDUM TO ALL UNITED STATES ATTORNEYS AND ALL HEADS OF OFFICES, DIVISIONS, BUREAUS AND BOARDS OF THE DEPARTMENT OF JUSTICE

SUBJECT: Dual Prosecution Policy in Cases Involving Violations of Civil Rights

By memorandum dated April 6, 1959, former Attorney General Rogers set forth Department of Justice policy guidelines regarding federal prosecution of an individual where there has already been a state prosecution of that individual for substantially the same act or acts.

I have reviewed this policy as it applies to cases involving the violation of federal statutes pertaining to civil rights. It is my belief that these statutes protect interests which merit enforcement in their own right, regardless of whatever related enforcement action has been taken by the states. Accordingly, the policy which I shall follow in considering recommendations from U.S. Attorneys regarding separate federal prosecutions is that each and every allegation of a violation of the civil rights laws shall be evaluated on its own merits, with the determining factor being whether or not a federal prosecution is likely to vindicate rights sought to be protected by those laws. The April 6, 1959 guidelines are hereby modified to the extent they are inconsistent with this policy.

GRIFFIN B. BELL
Attorney General

Appendix C

(Memorandum)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-1317

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,

Plaintiffs,

v.

GRIFFIN B. BELL, *et al.*,

Defendants.

MEMORANDUM

The plaintiffs in this proceeding have filed a motion for attorneys' fees and costs under the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988. For the reasons set forth below, the Court finds that plaintiffs are entitled to a reasonable award.

I. *Background*

In 1971, Carnell Russ, a black, was fatally shot by a white Arkansas law officer while detained for an alleged speeding violation. The officer was subsequently acquitted of manslaughter charges by a state court jury deliberating less than fifteen minutes. After reviewing the transcript of the manslaughter trial proceedings and Federal Bureau of Investigation (FBI) reports, the Department of Justice decided not to prosecute anyone under the federal criminal civil rights statute, 18 U.S.C. § 242.

Appendix C

The National Association for the Advancement of Colored People (NAACP) and the Russ family brought this action under the Civil Rights Act, 42 U.S.C. §§ 1981 and 1985, challenging the adequacy of the federal investigation and the decision not to prosecute. In essence, they claimed that the Justice Department illegally deferred to state proceedings, thereby pursuing a policy, established in 1959 by Attorney General William Rogers, not to follow a state prosecution with a federal trial for the same act, absent compelling reasons. As applied to civil rights cases, specifically to the Russ shooting, plaintiffs labeled this policy unreasonable and racially discriminatory.

In February of 1977, Attorney General Griffin Bell issued a memorandum modifying the 1959 non-dual prosecution policy in the civil rights field. He announced that "each and every allegation of a violation of the civil rights laws shall be evaluated on its own merits," irrespective of related state enforcement action.

Agreeing that this memorandum effectively mooted this action, the parties moved jointly to dismiss. Finding that the Bell memo was indeed "in accord with the policy objectives which underlie this suit," the Court dismissed the case without prejudice.

Plaintiffs seek an award of $28,700.00 in attorneys' fees and $855.50 in costs under 42 U.S.C. § 1988, which provides in relevant part that

> [i]n any action or proceeding to enforce a provision of sections 1981, . . . 1985, . . . of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Defendants do not contest the validity of applying this act retroactively or to obtain an award from the government.

See S. Rep. No. 94-1011, 94th Cong., 2d Sess. 4-5 (1976). They do contest plaintiffs' status as prevailing parties under the statutory scheme and the reasonableness of the amounts requested. On balance, the Court finds that plaintiffs have prevailed, since this action was a catalytic factor in the issuance of the memo. Further, the Court finds that their counsel are entitled to an award of $26,912.25.

II. *Plaintiffs Are Prevailing Parties*

To determine whether a party has prevailed in order to collect attorneys' fees under § 1988, the Court must focus on whether that party has accomplished the objectives of his litigation. *Parker* v. *Matthews,* 411 F. Supp. 1059, 1064 (D.D.C. 1976), *aff'd sub nom. Parker* v. *Califano,* 561 F.2d 320 (D.C. Cir. 1977). A party need not win a full trial on the merits to be said to prevail, but the lawsuit must have resulted in or been the catalyst of a victory for the party or the class he represents. *Parker* v. *Califano, supra; Parham* v. *Southwestern Bell Telephone Co.,* 433 F.2d 421 (8th Cir. 1970); *Fogg* v. *New England Tel. & Tel. Co.,* 346 F. Supp. 645 (D.N.H. 1972).

The defendants here claim that plaintiffs accomplished none of the objectives of this litigation The Order of Dismissal neither required the government to undertake a full investigation of the Russ shooting nor provided monetary relief for the Russ family. Because they maintain that non-dual prosecution considerations did not govern in the Russ case, defendants disavow any relationship between the complaint and issuance of the Bell memorandum. Indeed, they deny the existence of any such policy and interpret the memorandum to be a clarification of Department rules, rather than a policy reversal. In specific, Attorney General Bell was merely explaining why the De-

partment brought a criminal prosecution in the Morales case after a state conviction. *See* discussion *infra* at page 4.

Viewing defendants' arguments to be at best disingenuous, the Court finds that plaintiffs' persistent prosecution of this action was a strong catalytic factor in the issuance of the Bell memorandum. True, plaintiffs did not obtain monetary relief or federal investigation with an eye toward prosecution, the latter presumably due to statute of limitations problems. They did, however, achieve the policy objectives outlined in the second amended complaint.

The Court and the parties alike recognized that plaintiffs' major reason for pursuing this lawsuit was to publicize and correct the government policy of deferring to prior state civil rights prosecutions, with its discriminatory impact on Carnell Russ and other minority group members. The joint motion to dismiss and the resulting Supplemental Memorandum Order of August 16, 1977, identify this as the "primary objective" of the suit and admit that the Bell memorandum is "in accord" with that policy objective.

In his memorandum, Attorney General Bell announced that the 1959 non-dual prosecution policy shall not govern in civil rights cases. While not admitting that the 1959 policy had been used in the Russ case or others, the memo suggests that agency practice had not been one hundred percent in accord with the standards outlined in the memo. Even assuming that the memo was issued to clarify government policy or to prod federal attorneys and investigators to pursue dual prosecutions more vigorously, its issuance was bound to benefit victims of civil rights crimes.

Discovery in this case revealed that the FBI and Justice Department received many complaints requesting inde-

pendent federal investigations of the shooting deaths of minority persons by white law enforcement officers, following questionable state proceedings. The most publicized of these involved the 1975 killing of Ricardo Morales, a Mexican-American, by Texas Police Chief Frank Hayes, for which Chief Hayes was sentenced by a state court to two to ten years for Aggravated Assault. *United States* v. *Hayes,* SA 77-Cr-38 (W.D. Tex. July 8, 1976). The U. S. Attorney reversed his decision not to prosecute, which had been based in part on the non-dual prosecution policy, only after massive pressure was brought to bear by civil rights groups and national politicians. *See* Affidavit of Ruben Sandoval, December 4, 1976.

In issuing the dual prosecution memorandum as one of his first official acts, Attorney General Bell was presumably addressing the major policy problem reflected by such numerous complaints. While the Morales case may have been the immediate motivation for the memo, the plaintiffs in this litigation also played a role in causing his action. In a situation such as this, where policy matters are concerned, plaintiffs should not be denied prevailing party status and attorney's fees only because other citizens have paralleled their attempts to correct the offending policies.

Indeed, the policy ramifications of this case distinguish it from the Title VII catalyst cases discussed by both parties. *See Foster* v. *Boorstin,* 561 F.2d 340 (D.C. Cir. 1977); *Fogg* v. *New England Tel. & Tel. Co., supra.* Where filing of a discrimination suit by an employee leads an employer to change promotion procedures, without the necessity of concluding court proceedings, it is not difficult to credit the employee with the change. Here, the plaintiffs challenged alleged policies of discriminatory investigation and prosecution by the federal government. Given that such dis-

crimination is more subtle than that involved in the average Title VII case, plaintiffs cannot be faulted because the relief sought and obtained is also difficult to pinpoint. The standards for dual prosecution set forth in the memorandum are intended to and will benefit victims of civil rights crimes. Pursuant to the terms of this Court's Order of August 16, 1977, the defendants are to comport with these standards, thereby increasing the likelihood that a Carnell Russ incident will not be repeated. Plaintiffs deserve credit for achievement of this policy objective.

The Court, exercising its discretion under 42 U.S.C. § 1988, finds that the disposition of this case leaves plaintiffs entitled to an award of reasonable attorneys' fees and costs.

III. *Reasonable Attorneys' Fees and Costs*

To gauge the reasonableness of attorneys' fees requested by plaintiffs, the Court has referred to the relevant criteria of *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), adopted by this Circuit in *Evans* v. *Sheraton Park Hotel*, 503 F.2d 177 (D.C. Cir. 1974), which include: 1) the experience and reputation of the attorneys; 2) the time and labor required; 3) the novelty and difficulty of the questions; 4) the nature and length of the professional relationship with the client; 5) the amount involved and results obtained; and 6) the customary fee.

Plaintiffs have filed affidavits in support of their request for attorneys' fees of $28,700.00. Their principal attorney, James I. Meyerson, Esquire, has been an Assistant General Counsel for the NAACP since 1970 and has accumulated extensive litigation experience in the civil rights field. He seeks compensation at the rate of $100.00 per hour for 236 hours of legal work and 24 hours of travel. J. Francis

Polhaus, Esquire, NAACP attorney for 24 years, also seeks compensation at $100.00 per hour for 27 hours of legal work, including 17 hours on the motion for attorneys' fees.

Defendants view the requested amount to be unreasonably high, though they do not specifically contest the rate charged or the hours invested. They do object to plaintiffs' failure to document their attorneys' reputation or fees awarded in similar cases.

The Court finds that the award requested, minus compensation for travel hours, is reasonable and fair. The rate of $100.00 per hour is commensurate with counsels' experience in the civil rights field and their reputation, of which the Court takes notice. Given the breadth of plaintiffs' complaint and the novelty of the policy attack, which explains why comparable awards cannot be quoted, the hours spent on legal work are justifiable. Hourly compensation for travel hours, above and beyond expenses, is inappropriate. In sum, therefore, plaintiffs are entitled to attorneys' fees of $26,300.00.

In addition, plaintiffs seek to tax $855.30 in costs: $210.00 in plane fare and $96.00 in expenses incurred by counsel on three trips to Washington, D. C., to take depositions, to argue a discovery motion before the United States Magistrate, and to argue motions before the Court; $222.25 for deposition transcripts; $77.05 for expenses incident to the depositions; and $250.00 for copying charges.

On the basis of 28 U.S.C. §§ 1920 and 2412, the Court will allow the transcript ($222.25) and copying costs ($250.00) to be taxed in full. Plaintiffs are also entitled to be reimbursed for transportation costs ($140.00) incurred by counsel to appear before the Court on the two noted occasions. Plaintiffs will not be allowed travel-related expenses or the $77.05 of unspecified costs incident to tak-

ing of depositions. Costs will therefore be taxed in the amount of $612.25.

On the basis of the foregoing discussion and computation, the Court has determined that plaintiffs are entitled to a total award of $26,912.25, representing $26,300.00 in attorneys' fees and $612.25 in costs.

An appropriate Order will be entered.

Entered: March 31, 1978

/s/ BARRINGTON D. PARKER
Barrington D. Parker
United States District Judge

Copies to Counsel

Appendix D

(Order dated March 31, 1978)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-1317

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,

Plaintiffs,

v.

GRIFFIN B. BELL, *et al.*,

Defendants.

ORDER

In accordance with the Memorandum of this Court entered this date, it is this 31st day of March, 1978,

ORDERED that plaintiffs' application for attorneys' fees and costs be granted in the amount of $26,912.25, representing $26,300.00 in fees and $612.25 in costs, which is a fair and reasonable award in the present case; and it is

FURTHER ORDERED that defendant shall, within 30 days of the date of this Order, pay to plaintiffs' counsel, James I. Meyerson, Esquire, and J. Francis Polhaus, Esquire, the aforementioned sum of $26,912.25; and it is

Appendix D

FURTHER ORDERED that plaintiffs' counsel shall, upon receipt of the aforementioned sum of $26,912.25, reimburse to plaintiffs such sums as counsel have collected to date for their services in connection with this case.

/s/ BARRINGTON D. PARKER
Barrington D. Parker
United States District Judge

Copies to Counsel

Appendix E

(Opinion of United States Court of Appeals)

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1639

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*

v.

BENJAMIN R. CIVILETTI, IN HIS OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF THE UNITED STATES, *et al.*, APPELLANTS

No. 78-2039

MARILYN W. ANDRULIS, *et al.*

v.

UNITED STATES OF AMERICA, *et al.*, APPELLANTS

Appeals from the United States District Court for the District of Columbia

(D.C. Civil Action Nos. 75-1317 & 77-1936)

Argued April 23, 1979

Decided September 26, 1979

Judgment entered this date ←

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Appendix E

Janis Sposato, Attorney, Department of Justice, a member of the bar of the Supreme Court of Connecticut, *pro hac vice*, by special leave of court, with whom *Barbara Allen Babcock*, Assistant Attorney General at the time the brief was filed, *Earl J. Silbert*, United States Attorney General at the time the brief was filed, and *William Kanter* and *Mark H. Gallant*, Attorneys, Department of Justice, were on the brief, for appellant in No. 78-2039. *Dennis A. Dutterer*, Assistant United States Attorney, entered an appearance for appellant in No. 78-2039.

Cynthia L. Attwood, Attorney, Department of Justice, with whom *Drew S. Days III*, Assistant Attorney General, *Earl J. Silbert*, United States Attorney at the time the brief was filed, and *Walter W. Barnett*, Attorney, Department of Justice, were on the brief, for appellants in No. 78-1639.

J. Francis Pohlhaus for appellee in No. 78-1639.

I. Michael Greenberger for appellee in No. 78-2039.

Linda R. Singer and *Ronald A. Schechter* were on the brief for *amicus curiae*, urging affirmance in No. 78-2039 only.

Before WRIGHT, *Chief Judge*, WILKEY, *Circuit Judge*, and LARSON, *Senior District Judge*.*

Opinion for the court filed by *Senior District Judge* LARSON.

Dissenting opinion filed by *Chief Judge* WRIGHT.

LARSON, *Senior District Judge*: The above-captioned cases are consolidated on appeal because both raise the same central issue—that is, whether the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, permits an award of fees against the United States. After

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* The Honorable Earl R. Larson, United States Senior District Judge for the District of Minnesota, sitting by designation pursuant to 28 U.S.C. § 292(d).

careful deliberation, we conclude that the Awards Act does not operate as a waiver of sovereign immunity in this context. Therefore, as to the award of attorney's fees by the courts below, we reverse.

In *Andrulis v. United States*, plaintiffs Dr. Marilyn W. Andrulis and Andrulis Research Corporation (ARC) brought an action for damages, declaratory and injunctive relief in which they alleged, *inter alia*, that ARC had been unlawfully terminated from a program administered by the Small Business Administration (SBA) pursuant to § 8(a) of the Small Business Act, 15 U.S.C. § 637(a). Section 8(a) empowers the SBA to enter into contracts with other federal departments and agencies and to arrange, without competitive bidding, for the performance of these contracts by small business concerns. In their complaint, plaintiffs charged that ARC had been excluded from the § 8(a) program as a result of race and sex discrimination in violation of 42 U.S.C. §§ 1981, 1985(3) and 2000d.

On November 11, 1977, the district court[1] issued a temporary restraining order in the *Andrulis* case. Thereafter, the SBA agreed to reinstate ARC as a participant in the § 8(a) program and the parties entered into a consent decree to that effect. Relying upon 42 U.S.C. § 1988, plaintiffs next applied for and were granted $18,739.00 in attorney's fees and $1,135.03 in costs and disbursements. As to the award of attorney's fees, the government appeals.

NAACP v. Bell, the second case before this Court, grew out of the fatal shooting in 1971 of Carnell Russ, a black male, by a white Arkansas law enforcement officer in the course of an arrest for a traffic violation. The officer was subsequently acquitted of manslaughter charges by a state court jury. After reviewing the transcript of the trial

[1] The United States District Court for the District of Columbia, the Honorable Gerhard A. Gesell presiding.

proceedings, as well as FBI reports, the Department of Justice decided not to prosecute anyone under the federal criminal civil rights statute, 18 U.S.C. § 242.

Following the decision not to prosecute, the NAACP and the Russ family brought suit under the Civil Rights Act, 42 U.S.C. §§ 1981 and 1985, challenging the adequacy of the federal investigation and the decision not to prosecute. In essence, plaintiffs claimed that the Justice Department had deferred unlawfully to the state proceedings pursuant to a policy established in 1959 by then Attorney General William Rogers of not following a state prosecution with a federal trial for the same act absent compelling reasons. Plaintiffs charged that this policy was unreasonable and racially discriminatory as applied in the Russ case.

In February 1977, while this suit was pending in the district court, Attorney General Griffin Bell issued a memorandum dealing with prosecutions of civil rights violations by the Justice Department. The memorandum indicated that the Department would henceforth evaluate "each and every allegation of a violation of the civil rights laws . . . on its own merits" irrespective of related state enforcement action. Agreeing that the Bell memorandum effectively mooted plaintiffs' claim, the parties to this action moved jointly to dismiss. The district court [2] granted the motion and plaintiffs subsequently sought and were awarded $26,300.00 in attorney's fees and $612.25 in costs under 42 U.S.C. § 1988. The decision to award attorney's fees is the subject of this appeal.

To recover attorney's fees against the United States, a prevailing party must first surmount a formidable barrier, the doctrine of sovereign immunity. Under well established precedent, waivers of federal sovereign immunity "cannot be implied but must be unequivocally ex-

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[2] The United States District Court for the District of Columbia, the Honorable Barrington Parker presiding.

pressed." *United States v. King*, 395 U.S. 1, 4 (1969). With respect to awards of attorney's fees, the policy against implied waivers of federal sovereign immunity is embodied in 28 U.S.C. § 2412 [3] which has been consistently construed as immunizing the United States against attorney's fees awards absent clear or express statutory authority to the contrary. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 267-68 (1975); *Fitzgerald v. United States Civil Service Commission*, 554 F.2d 1186, 1189 (D.C. Cir. 1977); *Natural Resources Defense Council, Inc. v. EPA*, 512 F.2d 1351, 1353 (D.C. Cir. 1975). Such clear statutory authority may be found in language referring specifically to the liability of the United States. Thus, for example, Title II of the Civil Rights Act of 1964 provides:

> "In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the

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[3] 28 U.S.C. § 2412 as presently drafted provides:

> "Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. . . .".

Prior to 1966, neither attorney's fees nor costs were recoverable against the United States unless such liability was expressly provided for by act of Congress. In 1966, 28 U.S.C. § 2412 was amended to permit the recovery of costs unless specifically forbidden by statute. Congress, however, explicitly excluded "the fees and expenses of attorneys" from the costs recoverable under § 2412 as a matter of course. Thus, with respect to attorney's fees, § 2412 remains an explicit assertion of sovereign immunity. *See Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 267-68 (1975) ("But § 2412 on its face, and in light of its legislative history, generally bars such awards, which, if allowable at all, must be expressly provided for by statute. . . .".).

prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and *the United States shall be liable for costs the same as a private person.*" 42 U.S.C. § 2000a-3(b) (emphasis added).[4]

Alternatively, statutory authorization may be inferred by necessary implication from the statutory context in which a fee provision arises. This rationale was central to the First Circuit's conclusion in *Natural Resources Defense Council, Inc. v. EPA*, 484 F.2d 1331 (1st Cir. 1973), that an award of attorney's fees against the federal government was authorized under § 304(d) of the Clean Air Act, 42 U.S.C. § 7604. In that case, the government contended, *inter alia*, that a prevailing party in a citizen suit brought against the United States under § 304 of the Act could not obtain attorney's fees from the federal government because the attorney's fee provision of § 304(d),[5] while providing for recovery by "any party," did not specifically mention the United States by name. The First Circuit responded by noting that the government's "reading of the statute is in sharp conflict with its plain words, which authorize the award against 'any party' and which, in § 304(a), specifically authorize suits with the United States as a party." 484 F.2d at 1336, n.5. Because § 304(a) of the Clean Air Act specifically

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[4] Other civil rights statutes contain similar language. *See, e.g.*, 42 U.S.C. §§ 2000b-1, 2000e-5(k). In addition, a number of noncivil rights statutes explicitly provide for fee awards against the United States. *See e.g.*, 5 U.S.C. § 552(g)(2)(B) (Freedom of Information Act); 15 U.S.C. § 2059(e) (Consumer Product Safety Act).

[5] Section 304(d) provided:

"The Court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. . . ."

permitted suits against the Administrator of the EPA, the necessary implication was that Congress had intended the fee provision of § 304(d), which made express reference to § 304(a), to allow recovery against the United States.

In the context of the above discussion, the question before this Court is whether the Civil Rights Attorney's Fees Awards Act of 1976 expressly authorizes the recovery of fees against the United States so as to overcome the barrier of sovereign immunity contained in 28 U.S.C. § 2412. As amended, 42 U.S.C. § 1988 provides in relevant part:

> "In any action or proceeding to enforce a provision of sections [1981, 1985 or 2000d of Title 42] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." [6]

Appellees submit that the Awards Act by its plain language clearly and unequivocally permits awards of attorney's fees against the United States by authorizing a fee award in "any action or proceeding" to enforce, *inter alia*, the Reconstruction Era Civil Rights statutes (42 U.S.C. §§ 1981-1983, 1985, 1986) and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. Appellees find support for their position in *Hutto v. Finney*, 98 S.Ct.

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[6] In its entirety, 42 U.S.C. § 1988 reads as follows:

> "In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 U.S.C. §§ 1981, 1983, 1985, 1986], title IX of [the Education Amendment of 1972], or in any civil action or proceeding, by or on behalf of the United States of America to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

2565 (1978), in which the Supreme Court held the language of the Awards Act sufficient to overcome the immunity granted the states under the Eleventh Amendment to the United States Constitution. In so holding, the Court stated:

> "The Act itself could not be broader. It aplies to 'any' action brought to enforce certain civil rights laws. It contains no hint of an exception for State defending injunction actions; . . . ." 98 S.Ct. at 2575.

Similarly, appellees contend, the Awards Act contains no hint of an exception for the federal government.

In their reading of the Awards Act, we think appellees assign too much weight to Congress' use of the phrase "any action." That phrase has repeatedly appeared in attorney's fees provisions, yet when in the past Congress has sought to override 28 U.S.C. § 2412 it has apparently considered it necessary to add a phrase explicitly establishing the liability of the United States.[7] Generally, in construing a statute, we "are obliged to give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, No. 78-690 (S.Ct. June 11, 1979), slip op. at 5, citing *United States v. Menasche*, 348 U.S. 528, 538-39 (1955). Unless we are to regard the prior specific references to the United States inserted in fee provision statutes as mere surplusage, we must assume that Congress considered the "any action" language insufficient standing alone to waive federal sovereign immunity.

Considering that the Awards Act was enacted largely in response to the Supreme Court's ruling in *Alyeska Pipeline Service Co. v. Wilderness Society, supra*,[8] and given the *Alyeska* mandate that, to overcome the barrier

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[7] *See, e.g.*, 42 U.S.C. § 2000a-3(b) quoted *supra* and statutes cited at note 4 *supra*.

[8] *See* H. Rep. No. 94-1558, 94th Cong., 2d Sess. at 2 (1976); S. Rep. No. 94-1011, 94th Cong., 2d Sess. at 1 (1976).

of 28 U.S.C. § 2412, fee awards against the United States must be "expressly provided for by statute," 421 U.S. at 267-68, it is difficult to believe that if Congress had intended to override § 2412, it would not have used language in the Awards Act at least as clear and unequivocal as it has used in the past to waive federal sovereign immunity. *Cf. Shannon v. United States Department of Housing and Urban Development*, 433 F. Supp. 249, 251 (E.D. Pa. 1977), *aff'd*, 577 F.2d 854 (3d Cir.), *cert. denied*, 47 U.S.L.W. 3381 (Dec. 14, 1978) ("The unequivocal language to which the Court adverted in *Alyeska* and that contained in [prior statutes authorizing attorney's fees awards against the United States] stands in stark contrast to the silence of the Fees Awards Act.") Instead, the only specific waiver contained in the Awards Act occurs with respect to actions brought "by or on behalf of the United States . . . to enforce, or charging a violation of, a provision of" the Internal Revenue Code. *See Aparacor, Inc. v. United States*, 571 F.2d 552 (Ct. Cl. 1978). While the liability of the United States for fees in tax cases might have been more specifically defined, Congress' intent to waive federal immunity in the IRS suits is necessarily inferred since the United States and the taxpaying public are the only parties conceivably included within the provision, and the Awards Act allows an award to "the prevailing party other than the United States." No similar inference necessarily arises with respect to the remaining portions of the Act since the United States is neither the sole nor even the most likely defendant under the civil rights statutes in question.[9]

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[9] Actions under the Reconstruction Era Civil Rights statutes are generally brought by individuals against other individuals or against state or local governments. *See Hutto v. Finney, supra*, 98 S.Ct. at 2575. On their face, these statutes contain no waiver of federal sovereign immunity nor do they appear to create a cause of action against the United States as an

Considering the plain language of the Awards Act, we agree with the government that the most that can fairly be said is that the Act does not, on its face, preclude an assessment of attorney's fees against the United States. As this Court indicated in *Fitzgerald v. United States Civil Service Commission, supra,* 554 F.2d at 1189, however, the "absence of" language "contrary" to an award of attorney's fees against the government is not enough. There "must be [an] unequivocally expressed" affirmative authorization to overcome 28 U.S.C. § 2412.

We find nothing in the Supreme Court's opinion in *Hutto v. Finney, supra,* to contradict our reading of the Awards Act. In ruling that state and local governments are liable for attorney's fees under the Act, the Court in *Hutto v. Finney* rejected the state's argument that in order to abrogate the state's immunity under the Eleventh Amendment, Congress must "enact express statutory language making the states liable." 98 S.Ct. at 2576. The Court emphasized that the Act imposes attorney's fees "as a part of costs" and that costs have traditionally been awarded against the states without regard to the Eleventh Amendment. *Id.* The Court then concluded:

> "It is much too late to single out attorney's fees as the one kind of litigation costs whose recovery may not be authorized by Congress without an express statutory waiver of the States' immunity." *Id.* at 2577-78.

In *Hutto v. Finney,* The Supreme Court considered the absence of an express statutory waiver no obstacle to an

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entity. With respect to Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, at the time the Awards Act was passed Congress was uncertain whether a private action could even be brought under these statutes. Since that time, the Supreme Court has ruled that private causes of action are cognizable under Title IX. *Cannon v. University of Chicago,* 47 U.S.L.W. 4549 (May 14, 1979).

award of attorney's fees against the states. The same cannot be said with respect to federal liability. In the case of the federal government, there is no long tradition of awarding costs as a matter of course. Instead, prior to the amendment of 28 U.S.C. § 2412 in 1966, costs were recoverable against the United States only if expressly provided for by statute.[10] Moreover, § 2412 explicitly requires what the Supreme Court concluded the Eleventh Amendment does not—that is, an express abrogation of immunity from attorney's fees awards.

In concluding that the Awards Act authorizes awards of fees against the states, the Court in *Hutto v. Finney* also relied on legislative history which focused directly on state liability and established unequivocally that Congress intended the Awards Act to waive state immunity. 98 S.Ct. at 2575-76. No such unequivocal indication of congressional intent exists with respect to the issue of federal immunity. The floor debate surrounding passage of the Awards Act contains indications of divergence of opinion among members of Congress as to the implications of the Act for federal liability.[11] The House and

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[10] See discussion note 3 *supra*.

[11] Thus, for example, Congressman Railsback, the ranking Republican on the House Judiciary Committee which drafted the Awards Act, seemed to suggest that attorney's fees might be recoverable against the United States when, in response to a question, he said:

> "Mr. Speaker, if the gentleman will yield further, again it would be in the discretion of the court and nowhere in the bill do we prevent a school district or college from recovering reasonable attorneys fees, even in a case where the United States is a party plaintiff." 121 Cong. Rec.H. 12164 (daily ed., October 1, 1976).

However, a contrary stance appears to have been taken by Congressman Rodino, the Chairman of the House Judiciary Committee, in his response to a request from Senator Kennedy for comments on an amendment offered by Senator Goldwater

Appendix E

Senate Committee Reports on the attorney's fee legislation contain no discussion of the question of federal liability. This silence appears significant since the Committee Reports are the references members of Congress are probably most likely to consult before casting their votes for an understanding of the purpose and effect of a bill. *Maestro Plastics v. NLRB*, 350 U.S. 270, 287-89 (1956); *American Airlines, Inc. v. CAB*, 365 F.2d 939 (D.C. Cir. 1966); Sutherland, Statutes and Statutory Construction, § 48.06, p. 203 (4th ed.). Had Congress intended to abrogate federal sovereign immunity for purposes of the Awards Act, some discussion of the matter by the respective House and Senate Committees responsible for the legislation in their Committee Reports might have been expected.

The only direct support found in either Committee Report for the proposition that the federal government might be liable for fees under the Awards Act is a citation to *Caireaux v. Hills*, 425 U.S. 284 (1976), a case involving a Title VI claim brought against the Secretary of Housing and Urban Development, which appears in the House Report as part of a string of cases cited as examples of instances in which government officials have been defendants in civil rights actions. H. Rep. No. 94-1558, 94th Cong., 2d Sess. at 7 (1976). This oblique

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which would have subjected the United States to broad liability for attorney's fees in tax cases:

> "I fear that Senator Goldwater's amendment . . . will jeopardize the Civil Rights Attorney's Fees Awards Act of 1976. S. 2278 presently is a very narrow bill. . . . It does not involve federal spending. . . . The Committee is presently studying other bills, like Senator Goldwater's, which would go far beyond the 'American Rule' or the 'private attorney general' exception to it, and which may allow recovery against the Federal Government. We hope to take action next Congress on such bills." 122 Cong. Rec. S. 16490 (daily ed., Sept. 23, 1976).

reference to federal liability is, we think, hardly sufficient to constitute the kind of clear statutory authorization required to waive federal sovereign immunity with respect to attorney's fees awards.[12]

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[12] Appellees in the *Andrulis* case offer two additional theories under which they submit the award of attorney's fees in their case might be sustained. We find neither of these theories persuasive. Appellees rely first on the language of § 5(b) of the Small Business Act, 15 U.S.C. § 634(b) which provides that the Administrator of the SBA may "sue and be sued . . . in any United States district court. . . ." Appellees submit that the "sue and be sued" clause, which places the SBA on a par with private parties for purposes of federal court litigation, *Mar v. Kleppe*, 520 F.2d 867, 870 (10th Cir. 1975), constitutes an "express statutory consent" satisfying the requirements of 28 U.S.C. § 2412.

We acknowledge that through the "sue and be sued" clause Congress has provided a limited waiver of the sovereign immunity generally afforded agencies of the federal government. However, it is well established that Congress in waiving governmental immunity has the power to waive immunity entirely or to waive it for some purposes and retain it for others. *See Federal Housing Administration Region No. 4 v. Burr*, 309 U.S. 242, 244 (1939), and cases cited therein. Congress made no mention of attorney's fees in permitting the Administrator of the SBA to "sue and be sued." Moreover, the clause was enacted at a time when, under the "American Rule," the payment of attorney's fees would not have been regarded as an ordinary incident of litigation. Thus it seems logical to assume that in subjecting the SBA to suit Congress did not expect the government to be liable for attorney's fees. In any event, because § 5(b) of the Small Business Act neither directly nor expressly authorizes an award of fees, it appears inadequate on its face to override the general bar of 28 U.S.C. § 2412. *See Cassata v. Federal Savings and Loan Insurance Corp.*, 445 F.2d 122 (7th Cir. 1971) (Section 2412 held to preclude the recovery of attorney's fees from the FSLIC which, like the SBA, is a "sue and be sued" agency, *see* 12 U.S.C. § 1725(c)(4)).

In the alternative, appellees contend that an amendment to the Administrative Procedure Act (APA) enacted contemporaneously with the Awards Act contains an express

Given the importance of attorney's fees in ensuring enforcement of our civil rights laws, a strong policy argument can be made that the Awards Act should permit the recovery of attorney's fees against the federal government.[13] We leave for the Congress, however, the decision

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waiver of sovereign immunity sufficient to sustain an award of fees in the instant case. The APA amendment provides:

> "An action in a court of the United States seeking relief other than money damages . . . shall not be dismissed nor relief therein be denied on the ground that it is against the United States. . . ." 5 U.S.C. § 702.

Appellees submit that § 702 expressly waives sovereign immunity for relief against the United States, except for money damages, and the Awards Act provides a type of relief, attorney's fees, which the Supreme Court has concluded do not constitute money damages. *Hutto v. Finney, supra*, 98 S.Ct. at 2576, n. 24. Together, appellees claim, these statutes combine to expressly authorize the award of fees against the United States.

While imaginative, appellees' argument is unconvincing. The legislative history surrounding passage of the APA amendment suggests that Congress sought by the amendment to achieve the narrow purpose of withdrawing the defense of sovereign immunity in actions against federal agencies in which "specific relief" such as "an injunction, declaratory judgment, or writ of mandamus" not requiring any federal expenditure was sought. H. Rep. No. 94-1656, 94th Cong., 2d Sess. at 4-5 (1976). The amendment says nothing about the recovery of attorney's fees ancillary to such an action and, indeed, the amendment itself provides that "nothing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. Section 2412 forbids the award of attorney's fees against the United States absent express statutory authorization. We do not view the APA amendment as satisfying or modifying in any way that requirement.

[13] In this regard, the Committee Report accompanying the Senate version of the Act notes as particularly apt a Supreme Court opinion containing the following quotation of former

of whether to amend the Awards Act to explicitly allow recovery of fees against the United States, realizing that to do otherwise would be to exceed the limits of our interpretive function.

Insofar as they award attorney's fees to appellees, the orders of the district courts are reversed.

Justice Tom Clark in a suit brought under the Landrum-Griffin Act:

> "Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose. . . . Without counsel fees the grant of Federal jurisdiction is but an empty gesture. . . . *Hall v. Cole*, 412 U.S. 1 (1973), quoting 462 F.2d 777, 780-81 (2d Cir. 1972)." S. Rep. No. 94-1011, 94th Cong., 2d Sess. at 3 (1976).

The same comment might appropriately be made with respect to enforcement of the rights afforded under the civil rights statutes as applied to the federal government.

Appendix E

WRIGHT, *Chief Judge, dissenting*: The Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976), authorizes the award of attorneys' fees to "the prevailing party, other than the United States," in "any action or proceeding to enforce [certain civil rights laws]." [1] The "necessary implication," *see* majority opinion at 6, from the language of the statute, the purposes behind its enactment, and its legislative history is that Congress intended to authorize fee awards against the United States under the Act.[2] Appellees in both cases before us are "prevailing parties" within the meaning of the Act. For these reasons, I would affirm the judgments of the District Court in both cases.

I

The majority rightly points out that a party seeking to recover attorneys' fees against the United States must surmount the barrier posed by the doctrine of sovereign

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[1] 42 U.S.C. § 1988 (1976) provides in relevant part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. § 1681 et seq.], or in any civil action or proceedings, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(Brackets in original.) *NAACP v. Civiletti*, No. 78-1639, was brought under, *inter alia*, 42 U.S.C. §§ 1981, 1985 (1976). *Andrulis v. United States*, No. 78-2039, alleged discrimination in violation, *inter alia*, of 42 U.S.C. §§ 1981, 1985 (1976).

[2] Appellees in *Andrulis v. United States*, No. 78-2039, suggest two additional theories on which the award of attorneys' fees in that case might be sustained. *See* majority opinion at 13 n.12. Because I conclude that § 1988 authorizes awards against the federal government, I do not reach these alternative arguments.

immunity.[3] A waiver of sovereign immunity "'cannot be implied but must be unequivocally expressed.'" *United States v. Testan*, 424 U.S. 392, 399 (1976), *quoting United States v. King*, 395 U.S. 1, 4 (1969). The Supreme Court in *Testan* described the test for the specificity required as "whether any federal statute 'can fairly be interpreted as mandating compensation by the Federal Government * * *.' *Eastport S. S. Corp.* v. *United States*, 178 Ct. Cl., at 607, 372 F.2d, at 1009; *Mosca* v. *United States*, 189 Ct. Cl. 283, 290, 417 F. 2d 1382, 1386 (1969), cert. denied, 399 U.S. 911 (1970). We are not ready to tamper with these established principles * * *." 424 U.S. at 400. Thus the question presented by these cases is whether Section 1988 "can fairly be interpreted as mandating [payment of attorneys' fees] by the Federal Government." The majority says that this may be done in one of two ways: (1) statutory language that specifically refers to the liability of the United States; and (2) necessary implication from the statutory context in which the fee provision arises. Majority opinion at 5-6. In my view, Section 1988 satisfies the latter test.

II

Congress enacted Section 1988 in response to the Supreme Court decision in *Alyeska Pipeline Service Co. v.*

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[3] In this particular context this doctrine is reiterated in 28 U.S.C. § 2412 (1976), which proscribes fee awards against the United States except where specifically provided for by statute. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 257-259 (1975). Section 2412 states:

> Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys[,] may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. * * *

Wilderness Society, 421 U.S. 240 (1975). In *Alyeska* the Court held that federal courts do not have the power to award attorneys' fees to prevailing parties without specific statutory authorization. Prior to that decision lower federal courts had followed the fee-shifting policies Congress enacted in the attorneys' fees provisions of several civil rights statutes, for example, Titles II and VII of the Civil Rights Act of 1964,[4] 42 U.S.C. §§ 2000a-3(b), 2000e-5(k) (1976), and awarded attorneys' fees to prevailing parties in cases brought under other civil rights laws.[5] In Congress' view *Alyeska*

> created anomalous gaps in our civil rights laws whereby awards of fees are * * * suddenly unavailable in the most fundamental civil rights cases. For instance, fees are now authorized in an employment discrimination suit under Title VII * * *, but not in the same suit brought under 42 U.S.C. § 1981, which protects similar rights but involves fewer technical prerequisites to the filing of an action. * * *

S. Rep. No. 94-1011, 94th Cong., 2d Sess. 4 (1976). To eliminate these "anomalous gaps" Congress enacted the Civil Rights Attorneys' Fees Awards Act.

One theme that runs through the legislative history of the Act is the belief that attorneys' fees awards are

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[4] Title II of the Civil Rights Act of 1964 provides:

> In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 2000a-3(b) (1976).

[5] *See, e.g., Sims v. Amos*, 340 F.Supp. 691 (M.D. Ala.) (three-judge court), *aff'd*, 409 U.S. 942 (1972); *Stanford Daily v. Zurcher*, 366 F.Supp. 18 (N.D. Cal. 1973), *aff'd*, 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 547 (1978).

crucial to vigorous enforcement of the civil rights statutes covered by Section 1988. Quoting the words of the late Supreme Court Justice Tom Clark, the Senate Report declared:

> "Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose. * * * Without counsel fees the grant of Federal jurisdiction is but an empty gesture * * *. *Hall* v. *Cole*, 412 U.S. 1 (1973), quoting 462 F. 2d 777, 780-81 (2d Cir. 1972)."

S. Rep. No. 94-1011, *supra*, at 3.[6] The award of attorneys' fees is crucial because these civil rights laws depend heavily on private enforcement.[7] And as this court has noted, the policy favoring private enforcement of the civil rights laws is particularly compelling when a federal agency or official is the defendant. Unlike the

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[6] Senator Kennedy said in the Senate:

> It is a fundamental axiom of law that where there is a right the law should provide a remedy. Yet, without a provision to permit awards of attorneys' fees to successful parties, the rights secured by those civil rights laws covered by this act are hollow rights indeed. Enactment of this legislation would do much to assure all the citizens of this Nation that the words "equal protection of law" mean what they say, and that Congress firmly intends that all our civil rights laws be vigorously enforced.

122 CONG. REC. S 16252 (daily ed. Sept. 21, 1976). Congressman Drinan remarked in the House:

> If Federal laws providing for the protection of civil constitutional rights are to be fully enforced, Congress must provide effective remedies for the vindication of those guarantees. Authorizing the award of reasonable counsel fees is an important tool for effectuating that purpose.

122 CONG. REC. H 12160 (daily ed. Oct. 1, 1976).

[7] S. Rep. No. 94-1011, 94th Cong., 2d Sess. 2 (1976); H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 1 (1976).

cases involving private or state defendants, the complainants are not merely "private attorneys general"; they are the only attorneys general.[8] The Department of Justice does not sue other federal government agencies for violations of the civil rights laws. Indeed, as in the instant cases, the Justice Department is frequently counsel for the other side. Thus the reasons behind the enactment of Section 1988 support the inference that it authorizes awards of attorneys' fees against the United States and caution against interpreting the statute in a manner that will frustrate Congress' purposes.[9] As this court has said, "[O]ur duty is to favor an interpretation which would render the statutory design effective in terms of the policies behind its enactment and to avoid an interpretation which would make such policies more difficult of fulfillment, particularly where * * * that interpretation is consistent with the plain language of the statute." *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 689 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974). This is particularly essential where civil rights statutes are involved. Courts must accord such a statute "a sweep

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[8] *Parker v. Califano*, 561 F.2d 320, 331 (D.C. Cir. 1977).

[9] Courts have construed civil rights attorneys' fees provisions very broadly in order to further Congress' purposes. Thus the Supreme Court held in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), that notwithstanding the statutory language that the District Court "in its discretion" may award costs to the prevailing party, the purpose of encouraging private enforcement dictates that a prevailing party should recover attorneys' fees "unless special circumstances would render such an award unjust." *Id.* at 402. In *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), the court observed: "This Court, as part of its obligation 'to make sure that Title VII works,' has liberally applied the attorney's fees provision of Title VII, recognizing the importance of private enforcement of civil rights legislation." *Id.* at 716 (footnote omitted) (*quoting Culpepper v. Reynolds Metals Co.*, 421 F.2d 888, 891 n.3 (5th Cir. 1970)).

as broad as its language." *United States v. Price*, 383 U.S. 787, 801 (1966); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968); *Griffin v. Breckenridge*, 403 U.S. 88, 97 (1971).

III

Congress used very broad language when it enacted Section 1988. The Act authorizes the award of attorneys' fees in "*any* action or proceeding." (Emphasis added.) The Supreme Court recently confirmed the Act's broad reach when it held in *Hutto v. Finney*, 437 U.S. 678 (1978), that the language of the statute was sufficient to overcome the states' Eleventh Amendment immunity. In so holding the Court said:

> The Act itself could not be broader. It applies to "any" action brought to enforce certain civil rights laws. It contains no hint of an exception for States defending injunction actions * * *. * * *

Id. at 694. The language of the Act is also broad enough to apply to actions against the federal government. While the Act does not specifically mention the liability of the United States in civil rights cases,[10] not every attorneys'

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[10] Section 1988 authorizes fee awards to the prevailing party in "any civil action or proceedings, by or on behalf of the United States of America, to enforce, or charging a violation of, * * * the * * * Internal Revenue Code * * *." The Government argues that this is the only specific waiver in § 1988, and that the failure to mention the United States in the civil rights portion of § 1988 as well shows that the "any action" reference does not apply to the United States.

This argument is unpersuasive. The IRS section was an amendment to the original bill sponsored by Senator Allen. It was accepted by the bill's sponsors as a compromise to end a filibuster of the bill led by Senator Allen. The purpose of the Allen amendment was to provide relief to taxpayers who are being harassed by the Government.

> We know all too well the proclivity of the IRS to harass taxpayers * * *. [I]f the Government harasses a

fees provision that has been found to authorize fee awards against the federal government has specifically mentioned the liability of the United States.

For example, in *Natural Resources Defense Council, Inc. v. EPA*, 484 F.2d 1331 (1st Cir. 1973), the First Circuit held that Section 304(d) of the Clean Air Act, now codified at 42 U.S.C. § 7604(d) (Supp. I 1977), authorized an award of attorneys' fees against the United States. The court rejected the Government's claim that fee awards against the federal government were not authorized because the Act's "any party" language did not specifically refer to the liability of the United States.[11]

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taxpayer, * * * then the Government should be required to pay that attorney fee.

122 CONG. REC. S 16428 (daily ed. Sept. 22, 1976) (remarks of Sen. Allen). Since the Allen amendment only authorizes fee awards in certain actions *brought by the IRS*, it could not have used the term "any action" or "any action under the Internal Revenue Code." Hence, by mentioning the United States specifically in the IRS portion of § 1988 Congress merely intended to make it plain that § 1988 does not apply to all tax cases. On the other hand, in enacting the civil rights fee provision "Congress firmly intend[ed] that *all* our civil rights laws be vigorously enforced." 122 CONG. REC. S 16252 (daily ed. Sept. 21, 1976) (remarks of Sen. Kennedy) (emphasis added).

Indeed, a straightforward reading of the statute suggests the exact opposite of the Government's contention. The phrase "any action or proceeding" is used twice in the statute. The natural inference is that the phrase has the same meaning and coverage in the two uses (this explains why the limiting language "by or on behalf of the United States of America" was necessary). Since the phrase unmistakably encompasses awards against the United States in the IRS context, it is reasonable to assume that the same holds for the civil rights use.

[11] Section 304(d) provides:

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may

Moreover, this court recently held, without opposition from the Government, that the recent amendment of Section 307 of the Clean Air Act, 42 U.S.C. § 7607(f) (Supp. I 1977), to permit fee awards "[i]n any judicial proceeding under this section" [12] authorizes fee awards against the federal government. *Sierra Club v. EPA*, D.C. Cir. No. 76-1037, order of April 27, 1979 (award of attorneys' fees of $11,760 to Sierra Club ordered paid by EPA) (case consolidated with *ASARCO v. EPA*, D.C. Cir. No. 76-1030). Equally instructive is the fact that Congress only recently enacted Section 505(b) of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, 92 STAT. 2983, an attorneys' fees provision which, in the words of its sponsor, "parallels the Civil Rights Attorneys' Fees Awards Act of 1976 * * *." 124 CONG. REC. S 15590 (daily ed. Sept. 20, 1978) (remarks of Sen. Cranston). The language of Section 505(b) is virtually the same as that of Section 1988.[13] Section 505(b)'s sponsor and the accompanying Committee Reports made it clear that this attorneys' fee provision is to be used to

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award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. * * *

42 U.S.C. § 7604(d) (Supp. I 1977).

[12] 42 U.S.C. § 7607(f) (Supp. I 1977) states:

In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

[13] Section 505(b) provides:

In any action or proceeding to enforce or charge a violation of a provision of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

vindicate rights against the federal government.[14] If Congress thought Section 505(b) was precise enough to apply to the United States, then the same may be said of the statute after which it was modeled, Section 1988.

IV

The legislative history of Section 1988 provides substantial support for the conclusion that Congress intended to authorize fee awards against the United States under the Act.

A

There are numerous indications in the Senate and House Reports that Congress intended Section 1988 to have substantially the same coverage as the attorneys' fees provisions of the 1964 Civil Rights Act which apply to the federal government. Both Reports stressed the fact that the legislation was designed to make our civil rights laws consistent. The Senate Report said: "The purpose of this amendment is to remedy anomalous gaps in our civil rights laws created by [the *Alyeska* decision], and to achieve consistency in our civil rights laws." S. Rep. No. 94-1011, *supra*, at 1. In a similar vein the House

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[14] Senator Cranston, in introducing the attorneys' fees provision, said:

> Mr. President, the rights extended to handicapped individuals under title V of the Rehabilitation Act of 1973 —Federal Government employment, physical accessibility in public buildings, employment under Federal contracts, and non-discrimination under Federal grants—are and will continue to be in need of constant vigilance by handicapped individuals to assure compliance. Pri[va]te enforcement of these title V rights is an important and necessary aspect of assuring that these rights are vindicated and enforcement is uniform. The availability of attorneys' fees should assist substantially in this respect.
> * * *

124 CONG. REC. S 15590 (daily ed. Sept. 20, 1978). *See also* S. Rep. No. 95-890, 95th Cong., 2d Sess. 19 (1978).

Report stated: "In order to achieve uniformity in the remedies provided by Federal laws guaranteeing civil and constitutional rights, it is necessary to add an attorney fee authorization to those civil rights acts which do not presently contain such a provision." H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 1 (1976). Both Reports stressed that Section 1988 was fashioned after the attorneys' fees provisions of the 1964 Civil Rights Act. The Senate Report noted: "S. 2278 follows the language of Titles II and VII of the Civil Rights Act of 1964 * * *." S. Rep. No. 94-1011, *supra*, at 2. The House Report stated: "H.R. 15460 tracks the language of the counsel fee provisions of Titles II and VII of the Civil Rights Act of 1964 * * *." H.R. Rep. No. 94-1558, *supra*, at 5. The Reports also explained that the standards for awarding fees under Section 1988 would "be generally the same as under the fee provisions of the 1964 Civil Rights Act." S. Rep. No. 94-1011, *supra*, at 4. The natural inference from all these factors is that Congress intended Section 1988's coverage to be the same as the coverage of the fee provisions of the 1964 Act. That Congress omitted the language specifically referring to the liability of the United States for attorneys' fees is not significant.[15] Given all the indications that Congress intended Section 1988 to be just like the other civil rights attorneys' fees provisions, it is reasonable to assume that if Congress had intended to depart from the norm by immunizing the federal government from liability it would have done so explicitly.

The majority agrees that another section of the House Report contains further support for the view that Section 1988 applies to the federal government. *See* majority

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[15] The inference that the omission was deliberate and significant would have been more plausible if the same Congress had drafted the two statutes, or if in place of the "any party" language the fee provisions listed the parties covered, and the United States was included in one list but not in the other.

opinion at 12-13. In discussing the issue of fee awards to prevailing defendants, the House Report pointed out:

> [I]t should further be noted that governmental officials are frequently the defendants in cases brought under the statutes covered by H.R. 15460 [the bill which became § 1988]. *See, e.g.*, * * * *Gautreaux* v. *Hills*, [425 U.S. 284 (1976)]. Such governmental entities and officials have substantial resources available to them through funds in the common treasury, including the taxes paid by the plaintiffs themselves. * * * The greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities.

H.R. Rep. No. 94-1558, *supra*, at 7 (footnote omitted). By citing *Gautreaux v. Hills*, a case involving a Title VI claim brought against a federal cabinet officer, as an example of a case in which a government official could be a defendant in a civil rights suit, and by pointing out that such officials would be liable for fee awards under Section 1988, the Report supports the inference that Congress intended the federal government to be liable for fee awards.

B

Both the majority in its opinion and the Government in its briefs have studiously avoided any mention of the hearings on the legislation that became Section 1988. This is unfortunate because the report of these hearings shows that even the Department of Justice, represented by Rex E. Lee, Assistant Attorney General for the Civil Division, recognized that the legislation before the House Subcommittee would authorize fee awards against the federal government. In his testimony *in support* of the legislation, Mr. Lee said:

> H.R. 8220 would authorize the awarding of attorneys' fees to a prevailing plaintiff in actions brought under certain civil rights statutes. *Actions*

> *under the statutes involved have been brought against both Federal officers and private individuals.*
>
> * * * *
>
> H.R. 9552 authorizes the awarding of attorneys' fees as a matter of discretion in certain civil rights litigation. The prevailing party, other than the United States, may recover attorneys' fees.
>
> Thus, H.R. 9552 applies to *all plaintiffs or defendants except to the United States to the extent that it is a prevailing party.*

AWARDING OF ATTORNEYS' FEES, *Hearings Before the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice*, 94th Cong., 1st Sess. 176-177 (1975) (emphasis added) (hereinafter "House Hearings").[16] Equally revealing is the statement by Congressman Drinan. In introducing H.R. 9552 and several other attorneys' fees provisions he told the Subcommittee that:

> [U]nder these bills the Federal government could never recover its attorney fees. *On the other hand, it would be required to pay the counsel fees of a private prevailing party, which is prohibited gen-*

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[16] Mr. Lee went on:

> [The Department of Justice expresses] support in principle for H.R. 8220 and H.R. 9552, awarding of attorneys' fees to a prevailing party in civil rights actions under the revised statutes (sections 1981, 1982, and 1983, 1985, and 1986, of title 42, United States Code).

AWARDING OF ATTORNEYS' FEES, *Hearings Before the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice*, 94th Cong., 1st Sess. 179 (1975) (hereinafter "House Hearings"). H.R. 8220 and H.R. 9552 differed from each other only in that the former made the award of attorneys' fees mandatory whereas the latter made it discretionary. Mr. Lee favored discretionary awards and also had reservations about fee awards in every § 1983 case. Thus he supported the bills "in principle." *See* House Hearings at 176-180.

> *erally by current law (see 28 U.S.C. 2412). These bills, if enacted, would be exceptions to the general prohibition in 28 U.S.C 2412. That section need not be amended, however, since it now states: "Except as otherwise specifically provided by statute. . . ."*

House Hearings at 53 (emphasis added). H.R. 9552 became the House version of the legislation that was enacted as Section 1988. The language of H.R. 9552 was virtually identical to Section 1988 as it passed Congress.[17] To be sure, courts are generally wary of testimony before committee hearings as aids to statutory construction. *See S&E Contractors, Inc. v. United States*, 406 U.S. 1, 13 n.9 (1972). However, courts are willing to attach great weight to such testimony when it consists of "precise analyses of statutory phrases by the sponsors of the proposed laws." *Id.* Congressman Drinan introduced

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[17] H.R. 9552 provided:

> In any action to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, reasonable attorney fees as part of the costs.

House Hearings, *supra* note 16, at 244. This bill was approved by the House Judiciary Subcommittee with a technical amendment which conformed it to the Senate version, S. 2278, which at the time had cleared the Senate Judiciary Committee and was awaiting action by the full Senate. H.R. 9552 was subsequently aproved by the House Judiciary Committee with an amendment that added title IX of Public Law No. 92-318 to the statutes covered by the bill. A clean bill, H.R. 15460, was then reported to the full House. Other than the addition of title IX the only differences between H.R. 9552 and H.R. 15460 (the clean bill) were technical changes, not affecting the substance, made on the advice of the House Parliamentarian and staff and legislative counsel. *See* H.R. Rep. No. 94-1558, *supra* note 7, at 3-4 & n.4. Time pressures made it necessary for the House to adopt the Senate version, S. 2278, in place of H.R. 15460. However, the two bills were nearly identical.

H.R. 9552 to the House Judiciary Subcommittee and was the chief sponsor of Section 1988 in the House. Both the House Report and the floor debates referred to Mr. Lee as a principal source of interpretation for Section 1988.[18]

C

Much of the Government's purported support for its claim that Section 1988 does not authorize awards against the United States derives from the floor debates. However, fairly considered the debates offer the Government little support. Rather, they support the conclusion that Congress intended Section 1988 to apply to the United States.

1. *The Senate Debates*

In his remarks in support of the bill Senator Hugh Scott, who opened the debate on S. 2278, explained that its enactment would "assure that attorney's fees will be available in suits brought under the reconstruction-era civil rights laws, * * * *in the same fashion and to the same extent as the statutes presently provide in cases brought under title VII of the 1964 Civil Rights Act.*" 122 CONG. REC. S 16251 (daily ed. Sept. 21, 1976) (emphasis added). Since the United States is liable for attorneys' fees in Title VII cases, the natural inference from this is that fees may be awarded against the United States under Section 1988.

The Government relies on an amendment offered by Senator Helms, an opponent of the bill, which purportedly shows that he understood the bill not to apply to the United States. However, a closer examination of the Helms amendment shows that Senator Helms misunderstood the import of the phrase "other than the United States." Section 1988 authorizes the award of fees to

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[18] *See, e.g.*, H.R. Rep. 94-1558, *supra* note 7, at 6; 122 CONG. REC. H 12162 (daily ed. Oct. 1, 1976) (remarks of Rep. Kastenmeier).

"the prevailing party, other than the United States * * *." The amendment would have inserted the phrase "or any State * * * or any political subdivision thereof" after the latter phrase. 122 CONG. REC. S 16433 (daily ed. Sept. 22, 1976). But the effect of this addition would have been to deny *both* the United States *and* state and local governments the right to recover attorneys' fees if they were prevailing parties. On the other hand, it is significant that Senator Allen, a principal opponent of the bill,[19] understood it to permit awards against the federal government. He unsuccessfully sponsored an amendment that would have limited the liability of the United States to situations in which an official of the federal government "has acted in a contumacious or vexatious manner." 122 CONG. REC. S 16567 (daily ed. Sept. 24, 1976).[20]

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[19] Senator Allen led a filibuster against the bill which he ended only when the bill's sponsors compromised by accepting an amendment that he proposed. *See* 122 CONG. REC. S 17050 (daily ed. Sept. 29, 1976); note 10 *supra*.

[20] The Government points to a Congressional Budget Office (CBO) "estimate" (*see* S. Rep. No. 94-1011, *supra* note 7, at 7; H.R. Rep. No. 94-1558, *supra* note 7, at 10) that enactment of the bill would result in no additional costs to the Government. This "no cost" feature of the bill was referred to in the floor debates. A few points are worth noting in assessing the significance of this "no additional costs" estimate. First, it appears that attorneys' fees awards against the Government are paid from the Department's existing appropriations. Mr. Lee confirmed this in his testimony before the House Judiciary Subcommittee. He said:

> [A]ttorneys' fees awards * * * necessarily *reduce* available resources, with concommitant impact on other Government programs.

House Hearings, *supra* note 16, at 178 (emphasis added). Thus the CBO did not foresee any additional costs (*i.e.*, new appropriations) to the Government. Second, it is significant that although the United States is liable for attorneys' fees under other civil rights statutes passed prior to § 1988, and is liable under § 1988 to prevailing defendants in some internal revenue cases, there is no line item in the Justice Depart-

ment's appropriations for such payments. These payments are apparently made from a general fund for "expenses necessary for the legal activities of the Department of Justice * * *." Pub. L. No. 95-431, 92 STAT. 1026. Third, it would have been incongruous for CBO or Congress to "estimate" the expenditures required to compensate individuals for the federal government's abridgement of civil rights laws. Finally, the amounts involved are likely to be minimal unless one assumes wholesale violations of civil rights laws by federal government agencies or officials. In light of all these factors, and given the other indications that Congress intended § 1988 to apply to the United States, it is reasonable to conclude that the CBO "estimate" is not incompatible with the conclusion that § 1988 authorizes awards against the federal government.

Much the same explanation can be given to a letter written by Congressman Rodino, Chairman of the House Judiciary Committee, introduced during the Senate debate on a proposed amendment to S. 2278 that would have subjected the United States to broad liability for tax cases. In the letter Mr. Rodino expressed concern that the amendment could jeopardize Administration support for the bill and weaken its chances for enactment. He said:

> I fear that Senator Goldwater's amendment—lacking a careful analysis by the Administration, and in light of the Administration's prior position on another IRS attorney fee provision—will jeopardize the * * * Act * * *. S. 2278 is presently a very narrow bill intended to enable private enforcement of civil rights acts. It does not involve federal spending, and has specifically been supported by the Administration at a hearing before [a] House Subcommittee * * *.
>
> The Committee is presently studying other bills, like Senator Goldwater's, which would go far beyond the "American Rule," or the "private attorney general" exception to it, and which may allow recovery against the Federal Government. We hope to take action next Congress on such bills. However, I fear that quick action on the Goldwater amendment, which goes far beyond the narrow provisions of S. [2]278, would defeat the bill.

122 CONG. REC. S 16490 (daily ed. Sept. 23, 1976). The majority cites this letter as evidence that some members of Congress did not think that S. 2278 applied to the United States. Majority opinion at 11 n.11. While it is possible to

2. *The House Debates*

The majority acknowledges that there is support in the report of the floor debates in the House for the conclusion that Section 1988 applies to the United States. In the only portion of the House debates that directly addressed the question of the liability of the United States under Section 1988, Congressman Railsback, the ranking Republican on the House Judiciary Subcommittee which drafted the House version of the legislation that became Section 1988 and a strong supporter of the bill, made it quite clear that it applied to the United States. The colloquy between Mr. Railsback and Mr. Quie is very revealing.

> Mr. QUIE. * * *
>
> I would like to ask the minority member, the gentleman from Illinois (Mr. RAILSBACK), a question. * * *
>
> First, I would like to ask if the U.S. Government is the plaintiff in a civil rights case against an individual or corporation, can that individual or corporation as the prevailing party be awarded attorney's fees against the U.S. Government?
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> * * * *

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interpret Mr. Rodino's letter in this manner, it is equally plausible that it merely reflects his expectation that the federal government will not often be guilty of violating civil rights laws and, hence, fee awards against the United States will be minimal. In this regard it is significant that Congressman Rodino did not challenge Congressman Railsback's statement, made in the House at a time when the debate specifically focused on the question of the liability of the United States, that § 1988 allows recovery of attorneys' fees from the federal government. *See* text at notes 21-22 *infra*. Congressman Rodino's real concern was with the broad scope of the proposed amendment—its possible impact on Administration support and therefore on the bill's chances for enactment—not the question whether § 1988 allows recovery against the federal government.

> Mr. RAILSBACK. * * * [A]s I read the bill before us, my answer would be yes. What we do is limit the United States from recovering *but we do not limit the rights of other prevailing parties to recover in the event the United States would be the plaintiff in an action such as described in the bill.*

122 CONG. REC. H 12163 (daily ed. Oct. 1, 1976) (emphasis added). Mr. Railsback further explained:

> [A]s I read the bill before us, we limit the right of the U.S. Government to recover, *we do not limit in a case where the United States would be the plaintiff suing a defendant, we do not limit the defendant's right to recover.* Where the judge might decide that a prevailing defendant should recover, *we do not limit the defendant from recovering from the United States in civil rights cases.*

Id. at 12163-12164 (emphasis added).[21] Another colloquy between Congressman Railsback and Congressman Quie is also quite plain in its implications.

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[21] The Government attempts to explain Congressman Railsback's statement as due to confusion caused by the Houses's "eleventh hour" consideration of the bill. In addition, it suggests that this statement was immediately refuted by Congressman Drinan, the bill's sponsor, when the latter remarked:

> [It] is very clearly limited. If a Federal judge came to that conclusion it would indeed be a most unusual case. This provision was inserted into the Senate bill. It did not originate with the House Judiciary Committee. It does give a remedy for the most extraordinary case where the defense could assert and prove to a Federal judge that an IRS case brought against him was so vexatious and so without merit that he should get compensation.

Id. at 12164. However, it seems that if there was any confusion it was on the part of Congressman Drinan. He apparently thought that Congressman Railsback was referring to the amendment to the bill, adopted in the Senate, which made the United States liable to prevailing defendants in certain

> Mr. QUIE. * * * [I]f the United States is the plaintiff and loses a civil rights case against a school district or college, can that school district or college as the prevailing party be awarded attorneys fees against the U.S. Government?
>
> Mr. RAILSBACK. * * * [A]gain it would be in the discretion of the court and *nowhere in the bill do we prevent a school district or college from recovering reasonable attorneys fees, even in a case where the United States is a party plaintiff.*

Id. at 12164 (emphasis added). This is the type of "precise analyses of statutory phrases by the sponsors of proposed laws" which courts give significant weight. *S&E Contractors, Inc. v. United States, supra,* 406 U.S. at 13 n.9. I am at a loss to understand how the majority can maintain, in the face of evidence of this sort, that the legislative history of the Act does not clearly show that Congress intended Section 1988 to apply to the United States.[22]

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tax cases. *See* note 10 *supra.* Congressman Railsback was not in fact referring to this provision. When Congressman Railsback reiterated his understanding that the bill authorized awards against the United States, his statement was not challenged by Congressman Rodino who shared the view that the Act allowed awards against the federal government. *See* text at notes 17-18 *supra.*

[22] The Government relies on, and the majority cites with approval, court decisions that have held that § 1988 does not apply to the United States, *Shannon v. HUD,* 433 F.Supp. 249 (E.D. Pa. 1977), *aff'd per curiam,* 577 F.2d 854 (3d Cir.), *cert. denied,* —— U.S. ——, 47 U.S. L. WEEK 3391 (Dec. 4, 1978); *Southeast Legal Defense Group [SLDG] v. Adams,* 436 F.Supp. 891 (D. Ore. 1977). The District Courts that decided the *Shannon* and *SLDG* cases did not have the benefit of the Supreme Court's comment in *Hutto v. Finney,* 437 U.S. 678 (1978), about the broad reach of § 1988. The Third Circuit in its brief *per curiam* did not address this point. Moreover, these courts appear to have been under the mistaken impression that the only attorneys' fees provisions that have

Appendix E

V

Only "prevailing parties" may be awarded attorneys' fees under Section 1988. The Government concedes that appellees in *Andrulis v. United States*, No. 78-2039, are prevailing parties. But it challenges the District Court's ruling that appellees in *NAACP* v. *Civiletti*, No. 78-1639, are prevailing parties. The majority does not reach this issue since it finds that Section 1988 does not apply to the federal government. Because I find Section 1988 applicable to the United States, I will briefly examine the Government's claim.

The case arose out of the fatal shooting of Carnell Russ, a black man, by a white Arkansas law enforcement officer while Russ was detained for an alleged traffic violation. The officer was tried for manslaughter

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been applied to the United States are those that specifically mention the United States by name. But as the majority of this court points out, an intention to authorize such awards may be inferred by "necessary implication" from the context in which a fee provision is found. *See* text at notes 11-14 *supra;* majority opinion at 6. Finally, the *SLDG* court misconstrued § 1988's legislative history (the Third Circuit's *per curiam* opinion in *Shannon* cited *SLDG* with approval, 577 F.2d at 856). The *SLDG* court noted that the Senate rejected an amendment offered by Senator Helms which would have made the United States liable for attorneys' fees to prevailing parties in every civil case and to acquitted criminal defendants. It concluded from this that Congress declined the opportunity to authorize fee awards in civil rights cases under § 1988. 436 F.Supp. at 893. This conclusion is erroneous. Senator Helms was an opponent of the bill and his aim in offering the amendment was to lessen the bill's chances for enactment by broadening the Government's scope of liability. The Administration for one was opposed to such broad liability. *See* House Hearings, *supra* note 16, at 177-182 (testimony of Mr. Lee). The fact that Congress declined to enact such a broad attorneys' fees provision can in no way be interpreted as a rejection of the Government's liability under the more limited legislation being considered.

and acquitted by a state court jury. The Justice Department reviewed the transcript of the trial and FBI reports and decided against prosecuting the officer under the federal criminal civil rights statute, 18 U.S.C. § 242 (1976).

Subsequently, the Russ family and the NAACP brought suit under the Civil Rights Act, 42 U.S.C. §§ 1981 and 1985 (1976), challenging the adequacy of the federal investigation and the decision not to prosecute. The nub of their claim was that the Justice Department illegally deferred to the state proceedings pursuant to a policy, established in 1959 by then Attorney General Rogers, of not initiating a federal prosecution after a state prosecution for the same act, unless there were compelling reasons. Plaintiffs sought both damages and injunctive relief.[23]

While this suit was pending, then Attorney General Bell issued in February 1977 a memorandum modifying the 1959 policy against dual prosecutions. He announced a new policy of evaluating "each and every allegation of a violation of the civil rights laws * * * on its own merits," without regard to related state enforcement action. Joint Appendix (JA) 277. Both parties agreed that the Bell memorandum effectively mooted the lawsuit, and they filed a joint motion to dismiss. In granting the motion the District Court agreed with the parties that the Bell memorandum was in accord "with the policy objectives which underlie this lawsuit * * *." JA 279, 282-283.

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[23] The District Court characterized the primary objective of plaintiffs' claim as "ensur[ing] that the * * * Department of Justice [does] not fail to vindicate federally protected interests by not prosecuting local law enforcement officers alleged to have violated federal criminal civil rights statutes simply because state or local authorities had already prosecuted those officers for state or local offenses arising from the same conduct." Joint Appendix (JA) 279.

Plaintiffs subsequently filed a motion for and were awarded attorneys' fees under 42 U.S.C. § 1988 (1976).

The award of attorneys' fees under Section 1988 is left to the discretion of the court. As such the District Court's judgment should be reversed only for an abuse of discretion. *Morrow v. Dillard*, 580 F.2d 1284, 1300 (5th Cir. 1978); *Sandford v. R. L. Coleman Realty Co.*, 573 F.2d 173, 179 (4th Cir. 1978). The District Court properly identified the test for a prevailing party as "whether that party has accomplished the objectives of his litigation. *Parker v. Matthews*, 411 F. Supp. 1059, 1064 (D.D.C. 1976), *aff'd sub nom Parker v. Califano*, 561 F.2d 320 (D.C. Cir. 1977)." JA 283.[24] The District Court found that the plaintiffs' "persistent prosecution of this action was a strong catalytic factor in the issuance of the Bell memorandum." JA 284. It also found that the plaintiffs had achieved the policy objective set out in their second amended complaint—publicizing and correcting the Justice Department's policy of deferring to prior state civil rights prosecutions. *Id.*

To be sure, fathoming the Attorney General's motives is not the easiest of tasks. Nevertheless, I conclude, after a careful review of the record, that the District Court did not abuse its discretion in awarding attorneys' fees to appellees as "prevailing parties."

VI

The attorneys' fees provisions of the civil rights statutes were enacted "to encourage individuals injured by racial discrimination to seek judicial relief * * *." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402

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[24] It is plain from the legislative history of § 1988 that a litigant may be a prevailing party even though the lawsuit was not prosecuted to a full trial on the merits. *See* S. Rep. No. 94-1011, *supra* note 7, at 5; H.R. Rep. No. 94-1558, *supra* note 7, at 7.

(1968). Courts construing these attorneys' fees provisions must strive to further this goal. The decision by the majority of this court will defeat Congress' purpose in enacting Section 1988 insofar as suits against the federal government are concerned. An examination of the purposes, language, and legislative history of Section 1988 provides ample support for the conclusion that Congress intended to authorize attorneys' fees awards against the United States under the Act.

I respectfully dissent.

Appendix F

(Order dated December 12, 1979)

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1639 September Term, 1979

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*

v.

BENJAMIN R. CIVILETTI, in his official capacity as the Attorney General of the United States, *et al.*,

Appellants.

And Consolidated Case No. 78-2039

BEFORE:

Wright, *Chief Judge;* Wilkey, *Circuit Judge;* and Larson*, *Senior Judge,* United States District Court for the District of Minnesota.

ORDER

Upon consideration of appellees' (NAACP, et al.) petition for rehearing, it is

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* Sitting by designation pursuant to Title 28 U.S.C. §294(d). Chief Judge Wright would grant appellees' petition for rehearing.

Appendix F

ORDERED, by the Court, that appellees' aforesaid petition for rehearing is denied.

Per Curiam

FOR THE COURT:

/s/ GEORGE A. FISHER
GEORGE A. FISHER
Clerk

Appendix G

(Order dated December 12, 1979)

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1639 September Term, 1979

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*

v.

BENJAMIN R. CIVILETTI, in his official capacity as the Attorney General of the United States, *et al.*,

Appellants.

And Consolidated Case No. 78-2039

BEFORE: Wright, *Chief Judge;* McGowan, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald and Mikva, *Circuit Judges.*

ORDER

The suggestion for rehearing *en banc* filed by appellees (NAACP, et al.) having been transmitted to the full Court and a majority of judges in regular active service not having voted in favor thereof, it is

Appendix G

ORDERED, by the Court, that appellees' aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam

FOR THE COURT

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Circuit Judge Robinson did not participate in the foregoing order.

Chief Judge Wright and Circuit Judge Wald would grant appellees' suggestion for rehearing *en banc*.

Appendix H

(Order dated January 4, 1980)

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1639 September Term, 1979

Civil Action No. 75-1317

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*

v.

BENJAMIN R. CIVILETTI, in his official capacity as the Attorney General of the United States, *et al.*,

Appellants.

Civil Action No. 77-1936

No. 78-2039

MARILYN W. ANDRULIS, *et al.*

v.

UNITED STATES OF AMERICA, *et al.*,

Appellants.

ORDER

IT IS ORDERED, *sua sponte*, that the orders of the Court entered on December 12, 1979, denying the petitions for

rehearing and the suggestions for rehearing *en banc* filed by appellees (Andrulis, et al. and the National Association for the Advancement of Colored People, et al.) be, and they hereby are, vacated.

FOR THE COURT:

/s/ GEORGE A. FISHER
GEORGE A. FISHER
Clerk

Appendix I

(Order dated January 4, 1980)

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1639 September Term, 1979

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*

v.

BENJAMIN R. CIVILETTI, in his official capacity as the Attorney General of the United States, *et al.*,

Appellants.

BEFORE: Wright, *Chief Judge;* Wilkey, *Circuit Judge;* and Larson,* *Senior Judge,* United States District Judge for the District of Minnesota.

ORDER

Upon consideration of appellees' (NAACP, et al.) petition for rehearing, and of the memorandum in support thereof filed by amicus curiae (Women's Legal Defense Fund, Inc.), it is

ORDERED, by the Court, that appellees' aforesaid petition for rehearing is denied.

Per Curiam

FOR THE COURT:

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

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* Sitting by designation pursuant to Title 28 U.S.C. §294(d). Chief Judge Wright would grant appellees' petition for rehearing.

Appendix J

(Order dated January 4, 1980)

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1639 September Term, 1979

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*

v.

BENJAMIN R. CIVILETTI, in his official capacity as the Attorney General of the United States, *et al.*,

Appellants.

BEFORE: Wright, *Chief Judge;* McGowan, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, and Mikva, *Circuit Judges.*

ORDER

The suggestion for rehearing *en banc* filed by appellees (NAACP, et al.) and the memorandum in support thereof filed by amicus curiae (Women's Legal Defense Fund, Inc.), having been transmitted to the full Court and a majority of judges in regular active service not having voted in favor thereof, it is

Appendix J

ORDERED, by the Court, *en banc*, that appellees' aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam

FOR THE COURT:

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Circuit Judge Robinson did not participate in the foregoing order.

Chief Judge Wright and Circuit Judge Wald would grant appellees' suggestion for rehearing *en banc*.

Appendix K

(Order dated December 12, 1979)

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

December 12, 1979.

Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 70-C-1384

Joseph Sam Perry, *Judge.*

No. 77-1698

IBERIA HAMPTON, et al.,

Plaintiffs-Appellants,

vs.

EDWARD HANRAHAN, et al.,

Defendants-Appellees.

ORDER

In *Hampton* v. *Hanrahan,* 600 F.2d 600, 643-44 (7th Cir. 1979) (*"Hampton II"*), we held that plaintiffs' attorneys were entitled to fees for their appellate work on the basis

of the Civil Rights Attorney's Fees Awards Act of 1976[1] ("the Act"). We refrained, however, from awarding fees because counsel did not submit affidavits to support their request. Pursuant to the instructions set forth in *Hampton II, id.* at 643, plaintiffs' attorneys have submitted a statement of fees, supported by affidavits. The attorneys who represent plaintiffs Clark, Satchel, Anderson, Bell, and Truelock ("Clark attorneys") petition for fees in the amount of $288,172.50[2] and $2,256 for costs.[3] Additionally they urge that a multiplier of between 2.5 and 3.0 be applied to the attorneys' fees award; interest be awarded at a rate of eight percent per year; and a $60,000 sum be granted for their appellate work in *Hampton* v. *City of Chicago,* 484 F.2d 602 (7th Cir. 1973), *cert. denied,* 415 U.S. 917 (1974) (*"Hampton I"*).

Attorneys for plaintiffs Hampton, Johnson, Brewer, and Harris ("Hampton attorneys") request $111,056.25 for attorneys' fees and $2,148.92 for costs,[4] in addition to a multiplier of 2. Upon consideration of the various motions and affidavits filed by the parties, the court finds that attorneys' fees in the amount of $72,215.00 should be awarded to the Clark attorneys and $27,695.00 to the Hampton attorneys. The costs granted are $935.00 and $497.50, respectively.[5]

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[1] Pub. L. No. 94-559 (Oct. 19, 1976), codified in 42 U.S.C. § 1988.

[2] $273,360 for principal appellate work; $14,812.50 for petition for rehearing.

[3] $1,977.50 for principal appellate work; $278.50 for petition for rehearing.

[4] $102,306.25 for principal appellate work and $1,938.92 for costs; $8,750 for defending judgment in reply to defendants' petition for rehearing and costs of $210.

[5] The cost figures are not disputed by either the state or federal defendants.

Appendix K

I

At the outset, we note that both the federal and state defendants contend that plaintiffs do not presently enjoy "prevailing party" status and thus are not entitled to attorneys' fees for appellate work. In *Hampton II,* we were not persuaded by this argument, nor are we convinced of its merits at this time. It is settled law that in order to be a prevailing party one need not win on each issue in the case. A party prevails if judgment is entered in his favor even though he did not sustain his entire claim. 10 Wright & Miller, *Federal Practice & Procedure,* § 2664. The legislative history of the Act makes clear that Congress intended that plaintiffs who "succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit" could be a "prevailing party" under the terms of the Act. *Nadeau* v. *Helgemoe,* 581 F.2d 275, 278-79 (1st Cir. 1978).

We believe plaintiffs have shown substantial success on the merits on appeal, including the reversal of the directed verdicts, the right to discover the alleged informant's identity, a hearing to determine what sanctions should be imposed against the federal defendants and their attorneys for suppressing documentary evidence, and consideration of plaintiffs' outstanding discovery demands on remand. Thus, plaintiffs are prevailing parties. We believe that any other construction of the Act would frustrate its basic rationale.

II

The starting point in calculating the awards to the attorneys in this case is *Hampton II.* There we stated that the factors to be considered in computing fees shall include:

(1) the time and labor required; (2) the novelty and difficulty of the question presented; (3) the skill required to perform the legal services; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee in the community; (6) whether the fee is fixed or contingent; (7) time limitations imposed by client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; (12) awards in similar cases.

Hampton II, supra, 600 F.2d at 643, *citing Johnson* v. *Georgia Highway Express, Inc.,* 488 F.2d 714, 717-19 (5th Cir. 1974).

Clark Attorneys

Following these criteria, we first consider the amount of time spent by the Clark attorneys in preparing the documents necessary for the appeal. Their affidavits state that a total of 3,658 hours[6] were spent on the main appellate effort and 227.25 hours[7] were devoted to the reply to defendants' petitions for rehearing.

The primary question presented is whether it was reasonably necessary to expend that number of hours to per-

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[6] The proportionate efforts of the Clark attorneys are:

Taylor:	1,531 hours or 41.85%
Haas:	542 hours or 14.82%
Cunningham:	446 hours or 12.19%
Hoffman:	755 hours or 20.64%
Moore:	384 hours or 10.50%

[7]

Taylor:	98.75 hours or 43.45%
Cunningham:	35.25 hours or 15.52%
Moore:	93.25 hours or 41.03%

form the legal services for which the attorneys are seeking compensation.[8] We are not convinced that the amount of hours attributed to preparing the case was reasonably necessary to advance plaintiffs' claims in a full, fair, and adequate fashion and, thus, we are compelled to reduce the amount of hours set forth above.

Turning to the materials submitted by the Clark attorneys, they claim 366 hours of abstracting, organizing, and filing the record in this court.[9] Having considered the fact that the same attorneys tried the case and presumably were familiar with the record, we believe that the time devoted to these activities is exorbitant and, accordingly, decrease the amount by fifty percent or 183 hours.

The Clark attorneys next claim that 2,943 hours were spent in researching, drafting, and editing the main and reply briefs, in addition to consulting each other on their efforts.[10] Hypothetically, if one person had expended this amount of time, working forty hours a week, he would have devoted over one year of his life to this effort. We find this to be an unreasonably lengthy amount of time

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[8] Defendants argue that the court should initially reduce the total number of hours of legal services submitted by the amount of time that was expended on the preparation of unsuccessful claims. Though defendants' position is generally correct, we find that a *de minimis* amount of time was spent on such claims and, accordingly, do not decrease the amount of hours expended by the Clark attorneys on the basis of this reasoning.

[9] Taylor: 276 hours
Haas: 65 hours
Hoffman: 25 hours

[10] Taylor: 1,069 hours
Haas: 419 hours
Hoffman: 705 hours
Cunningham: 370 hours
Moore: 380 hours

and believe that it should have taken only six months, or 1,472 hours, to prepare the main and reply briefs in this case. Our decision to disallow fifty percent of the attorneys' time is grounded on several factors. Although the factual issues in this case were complex and the proof of which required prodigious and diligent efforts, we view the principal legal issue presented on appeal—whether the district court erred in directing verdicts for the defendants—was relatively simple. Additionally, upon review of the attorneys' time statements, we find several instances where their efforts were duplicitous. Examination of the briefs further reveals that a significant amount of time was improperly expended in developing highly emotional and non-legal arguments. Arguments of this nature merit no place in any legal document and thus, we are compelled to substantially reduce the time spent on the briefs in the light of their quality factor. Lastly, we find that the attorneys may not be compensated for time devoted to preparing the appeal from the contempt judgments.

The Clark attorneys next claim that 141 hours were devoted to the research and preparation of motions.[11] Three attorneys were involved in this aspect of the appellate work. We believe that the work of one attorney would suffice and that it could be accomplished in 40 hours.

We next scrutinize the time that the Clark attorneys submit was devoted to preparing for oral argument. A total of 156 hours is suggested to the court.[12] We are

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[11] Taylor: 86 hours
Cunningham: 40 hours
Hoffman: 15 hours

[12] Taylor: 73 hours
Haas: 54 hours
Cunningham: 24 hours
Hoffman: 5 hours

aware of the above-average length of time that was allotted to the parties for oral argument; yet, we are not convinced that more than 40 hours were necessary to prepare for the oral presentation of the case in this court and thus, reduce the 156 figure to this sum.

The last category of hours listed in the Clark attorneys' materials concerns time devoted to preparing the attorneys' fees request. The defendants argue that no fees should be awarded for such activity, presumably on the theory that the plaintiffs received no benefits from this activity. We disagree with defendants' position. *See generally Weisenberger* v. *Huecker,* 593 F.2d 49, 53-54 (6th Cir. 1979); *Souza* v. *Southworth,* 564 F.2d 609 (1st Cir. 1977). We hold, however, that 40 hours, rather than 52 hours, is a more reasonable amount of time spent to perform this work on the ground that the nature of the work was largely that of gathering and compiling records of the time expended and duties performed—activities that, we believe, were not novel to these attorneys.

Subsequent to the filing of their "Petition for Approval of Bill for Attorneys' Fees and Costs," the Clark attorneys filed supplementary affidavits that requested additional fees for the time expended in preparing the answer to defendants' petitions for rehearing. A total of 227.25 hours was submitted. The hours were spent as follows: 10.25 hours for review of defendants' petitions;[13] 80.75 hours for research;[14] 124.25 hours for drafting, writing,

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[13] Taylor: 1.75 hours
Cunningham: 2.75 hours
Moore: 5.75 hours

[14] Taylor: 50.75 hours
Moore: 30 hours

and rewriting;[15] and 12 hours[16] for consultation.[17] Referring once again to our hypothetical lawyer, he would have devoted approximately six weeks to this phase of the case. The court does not believe that the work necessitated such a substantial amount of time. Taking into consideration the issues involved in the petitions for rehearing and the fact that the time sheets submitted by the Clark attorneys show several examples of both unreasonable time expenditures and duplicitous efforts, we believe that a reasonable amount of time required for adequate presentation of plaintiffs' position would have been 100 hours or 12.5 days.

In conclusion, we find that a reasonable amount of time required for full and fair presentation of plaintiffs' case would have been 1,874 hours—eight hours a day for approximately 234 days.

Having determined the amount of time and labor required for pursuing plaintiffs' claims on appeal and having considered the other criteria set forth in *Hampton II* relevant to this determination, we reach the question of what hourly rate plaintiffs' counsel are entitled to for their legal services. The attorneys' requested rates range from $40.00 per hour for an associate who graduated from

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[15] Taylor: 43.50 hours
Cunningham: 31.25 hours
Moore : 49.50 hours

[16] Taylor: 2.75 hours
Moore: 8 hours
Cunningham: 1.25 hours

[17] In calculating the number of hours expended by the attorneys in each of these four categories, we considered the first activity listed on a certain day. For example, on June 15, 1979, Moore spent eight hours discussing the case with co-counsel, in addition to researching. We had no basis upon which to further fractionate the time and, therefore, placed the entire amount of time in the consultation category.

law school in 1977 to $90.00 per hour for lead counsel. No lesser rate is requested for clerical activities. We find that the plaintiffs' attorneys are entitled to compensation for the hours spent in connection with this appeal at the rate of $25.00 per hour for clerical work and $40.00 per hour for legal services. Our decision is based upon the following factors.

Though the affidavits for the attorneys extensively discuss their experience, reputation, and abilities in the area of civil rights and constitutional litigation whch allegedly justifies the requested rates, they failed to submit evidence by attorneys from the community concerning the customary fee charged for similar legal services. Thus, we look to precedent for guidance. The cases indicate that the hourly compensation rate for presenting an appeal is lower than the rate that plaintiffs' attorneys request. *See Weisenberger* v. *Huecker,* 593 F.2d 49, 54 n.12 (6th Cir.), *cert. denied,* 48 U.S.L.W. 3222 (Oct. 1, 1979) ($50.00 per hour); *Souza* v. *Southworth,* 564 F.2d 609, 614 (1st Cir. 1977) (holding that "compensation greater than $50.00 an hour for appellate work in this case would be excessive"); *Rainey* v. *Jackson State College,* 551 F.2d 672, 677 (5th Cir. 1977) ($35.00 per hour). Two additional factors bearing upon our determination are that: (1) the Criminal Justice Act, 18 U.S.C. § 3006A(d), allows the modest rate of $30.00 per in-court hour and $20.00 per out-of-court hour and (2) the attorneys for the city and state are compensated for their litigation services at a rate of $35.00 per hour and $50.00 per hour, respectively.

Bearing in mind the criteria set forth in *Hampton II, supra,* we note that the attorneys have not submitted evidence showing that their appellate work precluded accepting other cases; nor have they shown a loss of clients

because of their involvement in this case. On the contrary, their reputations as civil rights attorneys may well be enhanced by their victory on appeal.

In reaching the hourly rate set forth above, we also draw from our own observations and experiences. We have observed these attorneys in court and are familiar with their work product. Additionally, our experience at the bench enables us to estimate the services rendered in terms of the quality of the work performed. We believe they have not exhibited in this case a degree of expertise that would qualify them for the high rates requested.

The final step in our analysis is multiplying the allowable number of hours spent on each activity times the reasonable hourly rate. Accordingly,

183	hours x	$25[18] =	4,575
1471	hours x	$40 =	58,840
40	hours x	$40 =	1,600
40	hours x	$40 =	1,600
40	hours x	$40 =	1,600
100	hours x	$40 =	4,000

We hold that a reasonable award of attorneys' fees is $72,215 for 1,874 hours of appellate work.[19] We also award counsel $935.00 for costs.[20]

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[18] The court finds that the 183 hours expended in abstracting, organizing, and reading the record are not legal services, in the strict sense, but rather clerical work.

[19] We reject the suggestions of the Clark attorneys that interest be allowed as part of the attorneys' fees and that we award them the amount of $60,000.00 for fees incurred for the *Hampton I* appeal.

[20] The attorneys request an award of $1,977.50 for costs spent on the principal appellate work: $1,550.00 for reproduction of the main and reply briefs and their appendices (at total of 620 pages

Appendix K

Hampton Attorneys

The materials submitted by the Hampton attorneys state that 1,835.75 hours[21] were spent on the principal appellate work and 87.50 hours[22] were expended on the preparation of the reply to defendants' petitions for rehearing.

Of the total number of hours submitted in the preparation of the main appellate effort, we find that 10% of that time (or 184 hours) was devoted to the claim of Verlina Brewer, which was unsuccessful on appeal. Having thus adjusted the requested amount of time to 1,652 hours, we consider whether that expenditure of time was reasonable. The court cannot accept that the appellate work in this case necessitated such a substantial amount of time and find 721 hours to be a more reasonable sum. Our decision is grounded on several factors.

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at $.10 per page, 25 copies) and $427.50 for reproduction of motions (171 pages at $.10 per page, 25 copies). Because the briefs submitted to this court were unnecessarily lengthy, we grant the attorneys $775.00 for reproduction costs. The attorneys are not entitled to reimbursement for costs expended in reproducing motions. *See* Rule 39(c), Fed. Rules App. Proc. Counsel also stated that the sum of $278.50 was spent on the reply to the petitions for rehearing: $118.50 for "outside typing" and $160.00 for reproduction of the answer (64 pages at $.10 per page, 25 copies). We award the attorneys $160.00 for reproduction costs, but disallow the request for money spent on typing. Thus, the attorneys are entitled to a total of $935.00 for costs on this appeal.

[21] The proportionate efforts of the Hampton attorneys and law clerks are:

Montgomery:	720	hours or	39.22%
Preston:	74	hours or	4.03%
Muse:	6	hours or	.33%
Ament:	16.50	hours or	.90%
Marbley (law clerk):	194.75	hours or	10.61%
Laws (law clerk):	824.50	hours or	44.91%

[22] Montgomery: 20 hours or 22.86%
Hubert: 67.50 hours or 77.14%

Appendix K

In the application for allowance of attorneys' fees, it is represented that Mr. Laws, a law clerk, devoted 824.5 hours to abstracting the record. In his affidavit in support of the application, Mr. Montgomery stated that he spent time supervising this task, which we calculate to be an additional 130 hours.[23] We find that this expenditure of time—954.5 hours—is unreasonable and suggests both inexperience and devotion of more time than warranted to properly perform the service. Having previously determined in regard to the hours submitted by the Clark attorneys that 183 hours is a reasonable amount of time for abstracting and organizing this record, we hold that the same sum of time applies to the efforts of the Hampton attorneys.

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[23] The affidavit of Mr. Montgomery states that he contributed 720 hours to the preparation of the principal appellate work. He failed, however, to provide a detailed record of time expended, including dates and nature of work performed during those periods. Such a failure to document time might merit disallowance of a fee award. *See King* v. *Greenblatt*, 560 F.2d 1024, 1027 (1st Cir. 1977), *cert. denied*, 438 U.S. 916 (1978). Given the circumstances of this case, however, including its importance and the performance of Mr. Montgomery in presenting his clients' claims, the court is unwilling to take such a drastic step. In light of Mr. Montgomery's failure to include time sheets in the materials submitted to the court, we have made the following estimates of time expended:

130 hours or 18%:	supervision of abstracting, reading, and organizing record
504 hours or 70%:	researching, drafting, editing main, and reply briefs
36 hours or 5%:	preparation of motions work
36 hours or 5%:	preparation for oral argument
14 hours or 2%:	preparation of attorneys' fees materials

These estimates are based upon the time sheets submitted by the Clark attorneys, from which a proportionate amount of time expended in each category listed above was derived.

Appendix K

We next consider the amount of time spent on researching, drafting, revising, and editing the main and reply briefs. The attorneys assert that 784.5 hours were devoted to these portions of the appellate work.[24] The defendants argue that the number of hours claimed to have been spent by the Hampton attorneys and related legal personnel is grossly excessive. We agree with this contention for the following reasons. The court has carefully examined the attorneys' court work and notes that the issues which these attorneys handled on appeal were few in number and relatively simple in nature. These issues included the inappropriateness of the directed verdict in favor of the shooters, the dismissal of the Brewer counts, and the refusal to allow discovery of the informant's identity. Although the Hampton attorneys researched the remaining issues in the case, they adopted and incorporated by reference the issues presented for review and the arguments thereto in the briefs of the Clark attorneys. Similarly, the Hampton attorneys adopted the statement of facts contained in the briefs submitted by the Clark attorneys. Moreover, we find that Mr. Montgomery's affidavit shows duplicative activities. For example, it states that Mr. Montgomery "supervised the preparation of a complete Statement of Facts in excess of 100 type-written pages"; "supervised the preparation of each legal argument contained in the Hampton Brief on an on-going basis"; and, "supervised the research and writing of . . . the Hampton Reply Brief."

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[24] Montgomery: 504 hours
Preston: 74 hours
Ament: 9.25 hours
Muse: 2.50 hours
Marbley: 194.75 hours

Thus, it is the court's belief, based upon its experience and careful consideration of the materials submitted by plaintiffs' attorneys, that an expenditure of 470 hours, or approximately 12 weeks, is a reasonable amount of time when measured in terms of the complexity of the case, the number of issues involved, and the work that actually was done.

The Hampton attorneys next claim compensation for 46.75 hours of motions work.[25] We do not believe that the services of three attorneys were warranted, nor that a period of approximately eight days was necessary for the preparation of this work. Therefore, the time will not be permitted and the allowable hours are reduced to 26.

With respect to the preparation of the oral argument, we calculate that Mr. Montgomery expended 36 hours on this activity.[26] We believe that a downward adjustment of time is warranted here, in the light of the attorney's experience in appellate work and familiarity with the issues he presented to the court. In our opinion, a fair amount of time required for full and adequate presentation of the plaintiffs' claims would have been 22 hours.

We scrutinized the attorneys' documents for a statement concerning the time devoted to preparing the attorneys' fees materials and found none. We believe, however, that fees should be awarded for such activity. *See generally,* p. 7, *supra.* Upon consideration of the materials submitted, we believe that 20 hours, or approximately two and one half days, is a reasonable amount of time spent in connection with this matter.

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[25] Montgomery: 36 hours
Ament: 7.25 hours
Muse: 3.50 hours

[26] *See* footnote 23, *supra.*

Appendix K

Finally, we consider the supplementary application of Mr. Montgomery for assessment of attorneys' fees for preparation of the reply to defendants' petitions for rehearing. It is claimed that a total of 87.5 hours was spent by two attorneys to perform this service. The hours were expended as follows: 9 hours for review of defendants' petitions;[27] 32 hours for research;[28] and, 46.5 hours for drafting, writing, and editing the reply.[29] Taking into account the limited scope of the issues involved in the reply, we find that the work could have been completed by one attorney in 40 hours—8 hours a day for 5 days.

In conclusion, we find that 761 hours would have been reasonably necessary for the Hampton attorneys to spend to present their plaintiffs' claims in a full, fair, and adequate fashion.

We next determine the reasonable hourly rate of compensation of both the attorneys and the legal personnel involved in this case. Mr. Montgomery and Mr. Hubert claim compensation at the rate of $100.00 per hour. The other attorneys request the amount of $50.00 per hour and the rate of $25.00 per hour is requested for clerical time. We find that the attorneys in this case would be reasonably compensated for their appellate work at the rate of $40.00 per hour. We agree with the attorneys' suggestion that the proper hourly billing rate for clerical activities is $25.00 per hour. We arrive at this determination after consideration of the various factors discussed above in connection with the Clark attorneys. *See* p. 99a,

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[27] Montgomery: 6 hours
Hubert: 3 hours

[28] Montgomery: 8 hours
Hubert: 24 hours

[29] Montgomery: 6 hours
Hubert: 40.5 hours

supra. Additionally, the court has considered the education, age, and experience of these particular attorneys. And, though the court recognizes their competence, we are not convinced that the nature of this work—appellate and almost exclusively out-of-court—merits the fees requested.

Lastly, the court multiplies the allowable number of hours spent on each activity times the reasonable hourly compensation. Accordingly,

183 hours	x	$25	= 4,575
470 hours	x	$40	= 18,800
26 hours	x	$40	= 1,040
22 hours	x	$40	= 880
20 hours	x	$40	= 800
40 hours	x	$40	= 1,600

We determine that a reasonable award of attorneys' fees is $27,695 for 761 hours of appellate work.[30] Additionally, we award counsel the sum of $497.50 for costs.[31]

Plaintiffs' attorneys fail to suggest how the fees should be apportioned between defendants. We hold that one-third of the award should be paid by the federal defendants and two-thirds should be paid by the state defen-

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[30] Both the Clark and the Hampton attorneys summarily argue that a multiplier, ranging from 2 to 3, be applied to their awards. We find no basis for employing a multiplier to these attorneys' fees.

[31] The figure of $1,938.92 is submitted to the court as representing costs spent in connection with the principal appellate work: $1,306.75 for typing; $51.00 for filing fees; $578.90 for printing and reproduction; and $2.27 for postage. Counsel is entitled solely to costs for reproducing the main and reply briefs and appendix and, accordingly, we grant the sum of $420.00 (168 pages at $.10 per page, 25 copies) for this work. The attorneys also request $210.00 for costs in regard to the reply to defendants' petitions for rehearing. We award the attorneys the sum of $77.50 (31 pages at $.10 per page, 25 copies). In total, counsel is entitled to $497.50 for costs.

dants. Defendants argue that any fee award would have to be collected from them in their official capacity, rather than in their personal capacities, in the absence of a finding of bad faith. We agree with defendants' position. It is supported by both the decision of the Supreme Court in *Hutto* v. *Finney*, 437 U.S. 678, 693 (1978) and the legislative intent of 42 U.S.C. § 1988.[32] *But see McNamara* v. *Moody*, No. 77-2466, slip op. at 1199-1201 (5th Cir. Nov. 15, 1979). The defendants in this case were sued in their official capacities and have been represented by government attorneys.

Lastly, we hold that the fees presently awarded should be credited to the clients against the portion of the recovery payable to the respective attorneys as a contingent fee if they prevail at the trial level.

IT IS SO ORDERED.

Pell, *Circuit Judge*, concurring. In my dissenting opinion in *Hampton II*, I stated that "[b]ecause of my position on the merits of the appeal I would only allow the appellate work [attorneys'] fees commensurate with the work involving the shooter defendants. . . ." 600 F.2d at 666.

My position, on the merits, however, was not that adopted by this court. Accordingly, addressing myself to the matter of appellate fees as ordered by the final judgment of this court, I agree with and concur in the foregoing order.

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[32] When a civil rights plaintiff prevails against a defendant who is a "state or local official," the express legislative intent is that "the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party)." S. Rep. No. 94-1011, 94th Cong., 2d Sess. 5 (1976), *reprinted in* [1976] U.S. Code Cong. & Admin. News 5908, 5913 (footnotes omitted).

No. 79-1543

Supreme Court, U. S.
FILED
MAY 30 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL., PETITIONERS

v.

BENJAMIN R. CIVILETTI, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1543

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL., PETITIONERS

v.

BENJAMIN R. CIVILETTI, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners seek review of a judgment reversing the district court's award of attorney's fees against the respondent federal officials pursuant to the Civil Rights Attorney's Fees Awards Act of 1976.

1. The case arose out of the fatal shooting of a black male by a white Arkansas law enforcement officer who was subsequently acquitted of a charge of voluntary manslaughter by a state court jury. The United States Department of Justice, after reviewing the trial transcript and reports of the Federal Bureau of Investigation, determined not to initiate prosecution under 18 U.S.C. 242, a federal criminal civil rights statute (Pet. App. 21a).

Petitioners, the National Association for the Advancement of Colored People and the family of the deceased, filed this action in August 1975 under 42 U.S.C. 1981 and 1985, challenging the adequacy of the Justice Department's investigation and its decision not to prosecute. Petitioners alleged that the respondent federal officials illegally deferred to the state court proceedings pursuant to a policy established in 1959 by Attorney General William Rogers against federal prosecution of persons tried on state charges, absent compelling reasons. Petitioners contended that, as to civil rights cases, this asserted policy against dual prosecutions was unreasonable and racially discriminatory (Pet. App. 22a).

In February 1977, Attorney General Griffin Bell issued a memorandum providing that every alleged civil rights violation would be evaluated on its own merits, regardless of any enforcement action by state officials (Pet. App. 22a). On the basis of this memorandum, the parties moved jointly to dismiss the action. The district court found that the memorandum was "in accord with the policy objectives which underlie the suit," and it dismissed the action without prejudice (*ibid.*).

2. Petitioners thereafter sought an award of counsel fees and costs under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988, which provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981 * * * [or] 1985 * * * of this title, * * * the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The district court found that petitioners were a "prevailing party" within the meaning of 42 U.S.C. 1988 because this action was "a catalytic factor" in the issuance of the Bell

memorandum, and it accordingly awarded petitioners attorney's fees and costs (Pet. App. 23a).[1]

A divided court of appeals reversed the district court's award. The court held that the Attorney's Fees Awards Act does not authorize an award of counsel fees against the United States (Pet. App. 31a-45a).[2] It did not address respondents' contention that petitioners were not prevailing parties within the meaning of the Act. Chief Judge Wright, dissenting, concluded that the Act authorized fee awards against the federal government and that petitioners were prevailing parties (*id.* at 46a-68a).[3]

3. The petition presents the question whether the Civil Rights Attorney's Fees Awards Act of 1976 authorizes an award of counsel fees against the United States. This question is identical to that presented in *Shannon* v. *United States Department of Housing and Urban Development*, 577 F. 2d 854 (3d Cir.), cert. denied, 439 U.S. 1002 (1978), and *Andrulis* v. *United States*, 609 F. 2d 514 (D.C. Cir. 1979), petition for cert. pending, No. 79-1542.[4] As indicated in our brief in opposition to the petition for certiorari in *Andrulis*, which is being filed concurrently with this opposition, the court of appeals' decision is clearly correct; and nothing has occurred since this Court's denial of review in *Shannon* that would make the issue worthy of review. We therefore rely on the arguments set out in our responses to the petitions filed in *Shannon* and *Andrulis* and have

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[1]The opinion of the district court is reported at 448 F. Supp. 1164.

[2]The rationale of the court of appeals' holding is set out in detail in the government's brief in opposition to the petition for a writ of certiorari in *Andrulis* v. *United States*, 609 F. 2d 514 (D.C. Cir. 1979), petition for cert. pending, No. 79-1542. (See text accompanying note 5, *infra*.)

[3]The opinion of the court of appeals is reported at 609 F. 2d 514.

[4]*Andrulis* was consolidated with the instant case in the court of appeals.

supplied petitioners with copies of our briefs in opposition in those cases.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MAY 1980

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[5]The majority of the court of appeals did not address our contention that the district court erred in ruling that petitioners were prevailing parties within the meaning of the Attorney's Fees Awards Act. Respondents argued in the court of appeals that the district court was clearly erroneous in finding that this litigation was "a catalytic factor" in the issuance of the Bell memorandum. Should this Court agree with petitioners that the Act authorizes fee awards against the United States, it should remand the case to the court of appeals for initial review of the district court's ruling that petitioners were prevailing parties. *Davis* v. *Passman*, 442 U.S. 228, 249 (1979).

A "prevailing party" issue is presented in the petition filed by the federal petitioners in *Johnson* v. *Hampton*, petition for cert. pending, No. 79-914; but that case does not involve the question of the relationship between relief sought in a complaint and action subsequently taken by the defendants. There is accordingly no reason to hold this case pending disposition of *Johnson*.

Supreme Court, U. S.
FILED
JUN 12 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 79-1543

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, MRS. CARNELL RUSS, VERNA RUSS, ROOSEVELT RUSS, ANGELA RUSS, CURTIS RUSS, SYLVIA RUSS, ANTHONY RUSS, PATRICIA RUSS, minors, by their mother and next friend Mrs. Carnell Russ,

Petitioners,

—vs—

BENJAMIN R. CIVILETTI, Attorney General of the United States, WILLIAM WEBSTER, Director of the Federal Bureau of Investigation, JOHN T. KELLY, Special Agent in Charge, Little Rock, Arkansas, Raymond Faist, formerly Special Agent in Charge, Little Rock, Arkansas, and others (unknown),

Respondents.

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION (PURSUANT TO RULE 24(5) OF THIS COURT)

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June 9, 1980

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Shannon v. *United States Department of Housing and Urban Development*, 577 F.2d 854 (3rd Cir. 1978), *cert. denied* 439 U.S. 1002, 99 S. Ct. 611, 58 L. Ed.2d 677 (1978) 3, 4

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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 79-1543

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,

Petitioners,

VS.

BENJAMIN R. CIVILETTI, *etc., et al.*,

Respondents.

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION (PURSUANT TO RULE 24(5) OF THIS COURT)

In reply to the Brief of the Respondents in Opposition, the Petitioners, pursuant to Rule 24(5) of this Court, submit:

1. Notwithstanding that just recently the United States Court of Appeals for the Seventh Circuit modified its previously enunciated decision in *Hampton* v. *Hanrahan,* 600 F. 2d 600 (7th Cir. 1979) (as supplemented, —— F.2d —— (December 12, 1979), See: Appendix K to the Petition herein) and deleted therefrom reference to the "official capacity" of the federal defendants in so far as apportionment of the attorneys fees award was concerned (—— F.2d —— (April 15, 1979), see: Order, appended herein), some ambiguity exists in the order to leave open the effect, if any, of the decision on the instant case (in light of the issue

raised herein* and the conflict of the supplemental *Hampton* pronouncement with the decision of the majority of the panel below). Since this Court recently set aside the attorneys fees award, in toto, based on the absence of a "prevailing party status" to the successful *Hampton* Plaintiffs-Appellants, See: 48 U.S.L.W. 3780 (June 2, 1980), one could assume that the previously articulated conflict, referred to in the Petition (between the decision of the majority of the panel below and the Seventh Circuit), has been substantially undercut if not totally negated.

Nevertheless, notwithstanding the potential mooting of the conflict, in theory (since the Seventh Circuit decision was vacated), it is apparent that the conflict still retains a reality since the vacation was on a ground other than that focused upon herein, as a basis for the conflict, and since it is likely that the Seventh Circuit will continue to hold federal Defendants in their individual capacities responsible for attorneys fees to prevailing private civil rights litigants. Accordingly, a conflict does continue to exist between the majority of the panel below and the Seventh Circuit.

Furthermore, there still remains substantial reason, otherwise, for this Court to grant the requested review (as more fully discussed in the Petition).

2. Recently it was noted:

> "In the last half-century, numerous commentators have pointed out the injustice of continuing unneeded protection for the government at a cost of depriving individuals of remedies that would have been available against private defendants. These scholars have urged that the immunity doctrine be abandoned or, at the very least, that statutes seeming to contemplate a waiver of sovereign immunity without doing so in express terms be interpreted liberally." (Footnotes omitted).

See: Note, Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act, 80 Columbia Law Review 346, 364 (March, 1980). Commenting further and citing to the instant case as well as *Shannon* v. *United States Department of Housing and Urban Development*, 577 F.2d 854 (3d Cir. 1978), *cert. denied* 439 U.S. 1002, 99 S.Ct. 611, 58 L.Ed.2d 677 (1978) (to which the Respondents cite in support of their position that review herein be denied), the author wrote:

> "... it is surprising that recent cases, including *NAACP* v. *Civiletti*, have held the United States immune from claims under the Awards Act. While the Awards Act does not waive immunity in the specific language used in previous civil rights statutes, the wording, which provides a bar to government recovery as a prevailing party, makes no sense unless it is assumed that Congress envisioned the section to apply to litigation against the government." (Footnotes omitted). *Id.*

Continuing, the commentator wrote:

> "Furthermore, a Congress intent on encouraging the vindication of denials of civil rights would certainly desire that citizens be able to secure those rights as against the government, as 'private attorneys general' are especially needed where the public attorney general will not act. Moreover, the government, with its deep pocket and batteries of lawyers, is the kind of opponent few individuals could fight effectively without fee shifting. Finally, the government cannot serve as a model

* The fundamental issue herein, as raised for review, is whether under the Civil Rights Attorneys' Fees Awards Act (42 U.S.C. Section 1988), a prevailing private civil rights litigant can secure fees against federal officials.

to its citizens if it can so easily escape enforcement of the civil rights laws." *Id.*

The Respondents assert that "nothing has occurred since this Court's denial of review in *Shannon* that would make the issue [raised herein] worthy of review." See: Brief in Opposition at page 3.

In view of the obvious concern expressed by scholars and commentators about the over-riding public interest issue raised herein and in light of the deterring effect of the adverse decision of the majority of the panel below and of the Third Circuit in *Shannon* with respect to effective enforcement of civil rights statutes against the federal government (and the conflicting view recently expressed by the Seventh Circuit, albeit somewhat confusing and now vacated on other grounds), there is every reason for this Court to now address the issue. Accordingly, it is incumbent upon this Court to accept review and resolve this important controversy once and for all.

3. It is submitted that without the private attorneys' general efforts in the instant case, the public attorney general would not have had the impetus to issue the memorandum which effectively undercut the previously enunciated federal policy of non-dual prosecution (where state and/or local efforts have been undertaken with respect to alleged criminal wrongdoing on the part of local law enforcement agents); and the federal criminal/civil rights efforts being undertaken (and continuing) in the State of Florida, as a consequence of the recent civil unrest, would not, in all likelihood, have transpired. Thus, notwithstanding the Respondents view that this matter should be remanded to the Court below on the issue of "prevailing party status", should this Court find for the Petitioners on the fundamental issue raised herein, the Petitioners believe that their "pre-

vailing party status" is testified to by the efforts of the federal Defendants in the State of Florida, at this time; and that the prevailing party status is of inconsequential matter herein. If anything, the efforts in Florida manifest the need to allow fees from the federal government to prevailing private civil rights litigants in order to effect more positive action and policies from the federal government in the area of civil rights and civil liberties (as were secured by the Petitioners from and through the instant litigation).

CONCLUSION

For the foregoing reasons (in addition to those otherwise previously expressed and discussed) the Petition herein should be granted.

Respectfully submitted,

.....

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Attorneys for Petitioners

BY: .....

June 9, 1980

Certificate of Service

James I. Meyerson, one of the attorneys for the Petitioners, certifies that on the 11th of June, 1980, I did serve three copies of the foregoing Petitioners' Reply to Respondents' Brief in Opposition upon the attorneys for the Respondents by mailing the same, postage prepaid, first class, as follows: Drew Days, Esq., Assistant Attorney General, Walter W. Barnett, Esq., Cynthia L. Attwood Esq., Attorneys, Department of Justice, Washington, D.C. 20530, and the Honorable Wade McCree, Jr., Solicitor General, Justice Department, Washington, D.C. 20530.

Respectfully submitted,

.....

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Attorney for Petitioners

BY: .....

Appendix

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

April 15, 1980

Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*

Nos. 77-1698, *et al.*

IBERIA HAMPTON, *et al.*,

Plaintiffs-Appellants,

vs.

EDWARD HANRAHAN, *et al.*,

Defendants-Appellees.

On Petitions for Rehearing.

ORDER

On consideration of the motions filed by the state and federal defendants, respectively, for rehearing and suggestions for rehearing *en banc* of the order with respect to the award of attorneys fees issued on December 12, 1979,

IT IS ORDERED that the penultimate paragraph on page 13 of that order be amended to read as follows:

> Plaintiffs' attorneys fail to suggest how the fees should be apportioned between defendants. We hold that one-third of the award should be paid by the federal defendants and two-thirds should be paid by the state defendants.

The remaining portion of that paragraph is deleted.

IT IS FURTHER ORDERED that the state defendants-appellees' petition for rehearing and suggestion for rehearing *en banc* concerning attorney fees is hereby DENIED.

IT IS FURTHER ORDERED that the federal defendants-appellees' petition for rehearing and suggestion for rehearing *en banc* is hereby DENIED.

IT IS FURTHER ORDERED that the motion filed by the United States to intervene is hereby DENIED.

PELL, *Circuit Judge*, concurring.

Pursuant to 42 U.S.C. § 1988, and citing as case authority *Davis* v. *Murphy*, 487 F.2d 362 (7th Cir. 1978), the majority opinion in this case granted the request of the appellants for attorneys' fees for their appellate work. 600 F.2d at 643. In my dissenting opinion, I implicitly agreed that the appellants were entitled to fees for their appellate work but would have only allowed the fees commensurate with the work involving the shooter defendants. 600 F.2d at 666. My treatment of the matter of fees came at the end of a lengthy dissent and was included in a catchall section dealing with "Other contentions and issues." I now am of the belief that my position was incorrect and that the appellants are not "prevailing" parties within the meaning of section 1988. It is true that they have prevailed thus far in the sense of keeping the litigation alive, but that is the

only sense in which they are prevailing. They yet have to establish by a final judgment the merits issue of their claim that their civil rights have been violated.

Because the position I have now reached after considerable reflection is a reversal of the position I have heretofore taken on the particular issue, I deem it necessary to review briefly some of the record matters in this complex litigation.

The only references I am able to find in the original briefs filed by the appellants are two in the brief of the Anderson plaintiffs. One of these is the last in a listing of the issues presented for review and reads in its entirety as follows:

> XIII. The plaintiffs should be awarded costs and attorneys' fees for the trial and for this appeal.

The second reference in the original brief appears at page 181 of the brief, a section devoted to the federal defendants, and reads as follows:

> And finally, cost for the trial and the appeal, and attorneys' fees* should be assessed against these Defendants.
>
> * *Donahue* v. *Staunton,* 471 F.2d 475 (7th Cir. 1972); *Stolberg* v. *Members of Board of Trustees,* 474 F.2d 485 (1st Cir. 1973); Civil Rights Attorneys Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641, effective October 19, 1976.

These fleeting references in a 247 page brief scarcely placed in focus the matter of fees as a serious issue and I am unable to find that it was even addressed in the briefs of the defendants. The issue, however, was addressed at some greater length in the reply brief of the Anderson plaintiffs to which the defendants, of course, did not have a

further opportunity of briefing a response. In their reply brief these plaintiffs while conceding that they "may not technically be 'prevailing parties'," contended that an award of attorneys' fees would be consistent with the policy, spirit, and congressional intent underlying section 1988. In addition, the appellants cited a number of cases as reflecting a growing body of precedent supporting the interim award of attorneys' fees.

The propriety of granting fees for appellate work in a situation such as the present where the claiming party had not yet prevailed on the merits was put in sharp focus by the federal defendants' petition for rehearing and suggestion for rehearing in banc in which this was one of only two issues raised. Specifically, these defendants contended that the cases on which the majority had relied were cases which disposed of the merits and that the principal case actually treating the issue, which was in the D.C. Circuit, had reached a contrary result. I agree with Judge Bazelon's analysis.

By an evenly divided vote, this court denied rehearing in banc which, as I see it, settled the issue insofar as this court was concerned, as the issue was squarely presented in the petition for rehearing. The petitions for rehearing presently pending before this court are in essence asking for reconsideration of an issue which has already been the subject of disposition. I do not read these petitions as essentially challenging the amount of the attorneys' fees but rather the propriety of any fees at all.

I am not unmindful that I joined in the order of this court of December 12, 1979, in which it was indicated that the court deemed that the plaintiffs had shown substantial success on the merits on appeal and that they were prevailing parties under section 1988. Upon further research and reflection, I am convinced that I was legally incorrect in

thinking that there was a basis for the award of any fees at this time.

Notwithstanding this "confession of error" on my part, I cannot be unmindful that procedurally this court by denying in banc rehearing has rejected the position which I now believe to be correct and I have no reason for believing that the three judges who voted against the rehearing in banc did not give full consideration to the propriety issue which was set forth in the petition for rehearing and is now being readvanced. The issue is one which has been raised by the defendants in their petitions for certiorari before the Supreme Court. I reluctantly conclude that it is the Supreme Court to which the defendants must look for relief from the order for the payment of the attorneys' fees in question.

I therefore concur in the foregoing order, albeit reluctantly.